

## Applicant Details

First Name **Nicholas**  
 Middle Initial **L.**  
 Last Name **Roberti**  
 Citizenship Status **U. S. Citizen**  
 Email Address [nlr9zn@virginia.edu](mailto:nlr9zn@virginia.edu)

Address
Street
<b>26 East Lake Road</b>
City
<b>New Fairfield</b>
State/Territory
<b>Connecticut</b>
Zip
<b>06812</b>
Country
<b>United States</b>

Contact Phone Number **2034486327**

## Applicant Education

BA/BS From **Washington College**  
 Date of BA/BS **May 2019**  
 JD/LLB From **University of Virginia School of Law**  
<http://www.law.virginia.edu>

Date of JD/LLB **May 22, 2022**  
 Class Rank **School does not rank**  
 Does the law school have a Law Review/Journal? **Yes**  
 Law Review/Journal **No**  
 Moot Court Experience **No**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk      **No**

**Specialized Work Experience**

**Recommenders**

Buck, D. Ruth  
rbuck@law.virginia.edu  
(434) 924-1042  
Mason, Ruth  
ruth.mason@law.virginia.edu  
(434) 243-3531  
Harmon, Rachel  
rharmon@law.virginia.edu  
(434) 924-7205

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Nicholas Roberti  
2101 Arlington Boulevard, Apt. 250-A  
Charlottesville, VA 22903  
nlr9zn@virginia.edu | (203) 448-6327

April 20, 2022

The Honorable Judith C. McCarthy  
U.S. District Court for the Southern District of New York  
Charles L. Brieant, Jr. U.S. Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601

Dear Judge McCarthy:

I am a third-year student at the University of Virginia School of Law, and I write to apply for a clerkship in your chambers. Upon my graduation in May 2022, I plan to spend a year as a litigation associate at White & Case LLP and would be available to clerk in your chambers during the 2023-2024 or 2024-2025 terms.

I am confident that I will contribute meaningfully to your chambers. As a summer associate, I drafted a brief in a matter before the Southern District of New York. I conducted thorough research and drafted precise memoranda as a research assistant to two professors at my law school. As a junior litigator, I would be thrilled to bring my love of research and writing to support your chambers.

Enclosed please find a copy of my resume, as well as my law school and undergraduate transcripts. I have also enclosed an excerpt from my final brief for my Legal Research and Writing course. Finally, you will receive letters of recommendation from Professor Rachel Harmon ((434) 924-7205), Professor Ruth Mason ((434) 243-3531), and Professor Ruth Buck ((434) 924-1042). My recommenders have stated that they would be pleased to speak with you.

Please feel free to reach me at the above email address and telephone number if you have any questions. Thank you very much for your time and consideration of my application.

Sincerely,

Nicholas Roberti

## Nicholas L. Roberti

2101 Arlington Blvd., Apt. 250-A, Charlottesville, VA 22903 • (203) 448-6327 • nlr9zn@virginia.edu

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### EDUCATION

#### **University of Virginia School of Law, Charlottesville, VA**

*J.D.*, Expected May 2022

- GPA: 3.44
- *Virginia Law & Business Review*, Editorial Board
- Outstanding Appellate Advocacy Award for Best 1L Oral Argument
- Peer Advisor, Academic Years 2020-2021 and 2021-2022

#### **Washington College, Chestertown, MD**

*B.A.*, Political Science (Minor: Economics), *summa cum laude*, May 2019

- Phi Beta Kappa
- Honors Thesis: *An Evaluation of Justice Kennedy's Jurisprudence in Romer, Lawrence, and Obergefell*
- Middendorf Scholar, for outstanding leadership qualities and academic performance
- Constitutional Law, Teacher's Assistant
- Senior Class Graduation Speaker
- NCAA Division III Baseball, four-year starting pitcher

### EXPERIENCE

#### **White & Case LLP, New York, NY**

*Litigation Associate*, Expected September 2022

*Summer Associate*, May 2021 – August 2021

- Drafted brief to New York Supreme Court on family law claim brought by *pro bono* client
- Participated as witness in mock deposition with associates and partners
- Researched and drafted memoranda analyzing claims in domestic contract dispute and jurisdictional issues in multinational antitrust matter

#### **University of Virginia School of Law, Charlottesville, VA**

*Research Assistant to Professor Rachel Harmon*, December 2021 – Present

- Conducting ongoing research for forthcoming academic article on police authority to issue lawful commands
- Drafted memorandum on policy implications of federal action on police reform

*Research Assistant to Professor Ruth Mason*, May 2020 – August 2020

- Drafted academic article in *Virginia Tax Review* on digital services taxes in European Union

#### **Lee/Shoemaker PLLC, Charlottesville, VA**

*Summer Associate*, June 2020 – August 2020

- Researched and drafted answers, memoranda, and motions for upcoming construction law trial for geotechnical engineer client

#### **Manhattan Institute, New York, NY**

*Legal Policy Intern*, May 2018 – August 2018

- Conducted research for *amicus curiae* brief in *Frank v. Gaos*, 139 S. Ct. 1041 (2019).

### INTERESTS

New York Yankees, CrossFit, watching and playing golf

UNIVERSITY OF VIRGINIA  
SCHOOL OF LAW

Name: Nicholas Roberti

Date: March 10, 2022

Record ID: nlr9zn

**This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.**

**Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.**

**FALL 2019**

LAW	6000	Civil Procedure	4	B+	Nelson, Caleb E
LAW	6002	Contracts	4	B+	Hynes, Richard M
LAW	6003	Criminal Law	3	A-	Coughlin, Anne M
LAW	6004	Legal Research and Writing I	1	S	Buck, Donna Ruth
LAW	6007	Torts	4	B+	White, George E

**SPRING 2020**

LAW	6001	Constitutional Law	4	CR	Forde-Mazrui, Kim A
LAW	7019	Criminal Investigation	3	CR	Armacost, Barbara Ellen
LAW	6107	International Law	3	CR	Deeks, Ashley
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck, Donna Ruth
LAW	6006	Property	4	CR	Johnson, Alex M

**FALL 2020**

LAW	7011	Comparative Constitutional Law	3	B	Versteeg, Emiliana Maria There
LAW	8651	Emerg Growth/Venture Captl:P&P	2	B+	Lincoln, Michael Robert
LAW	7022	Employment Discrimination	3	B+	Rutherglen, George
LAW	7059	Labor Law	3	A-	Hodges, Ann C
LAW	7071	Professional Responsibility	3	B+	Mitchell, Paul Gregory

**SPRING 2021**

LAW	8000	Advanced Legal Research	2	B+	Ashbrook, Leslie
LAW	7123	Class Actions/Aggregate Litgtn	3	A-	Ballenger, James Scott
LAW	6104	Evidence	4	B+	Barzun, Charles Lowell
LAW	7074	Professional Sports & Law	2	A	Dell, Donald L
LAW	7089	Racial Justice and Law	3	A-	Forde-Mazrui, Kim A

**FALL 2021**

LAW	7005	Antitrust	4	B+	Fischman, Joshua
LAW	7801	Antitrust Digital Economy (SC)	2	B+	Hockett, Christopher Burch
LAW	7111	Con Law II: Survy/Civl Liberty	3	A-	Ballenger, James Scott
LAW	7106	Law of the Police I	3	A-	Harmon, Rachel A

**SPRING 2022**

LAW	8810	Directed Research	1	NG	Harmon, Rachel A
LAW	7178	Feminist Jurisprudence	3	NG	Coughlin, Anne M
LAW	7062	Legislation	4	NG	Nelson, Caleb E
LAW	7144	Negotiation	3	NG	Shadel, Molly Bishop
LAW	9081	Trial Advocacy	3	NG	Stolpe, Kristin Elysse

Page: 1 of 2

Record of: Mr. Nicholas L. Roberti  
Print Date: 03/17/20  
Student ID: 3000642  
DOB: 11-01

SSN: XXX-XX-4601

Released To :

Mr. Nicholas L. Roberti  
26 E Lake Road  
New Fairfield CT 06812-2554

Course	Title	Cred	Gr.	GR	Pt	Course	Title	Cred	Gr.	GR	Pt
FALL 2015 (08/31/2015 to 12/18/2015)						SPRING 2017 (01/23/2017 to 05/12/2017)					
POL 102	American Gov't and Politics	4.00	A	16.00		POL 202	Justice, Pwr & Political Thght	4.00	A	16.00	
HIS 201	History of the U.S. to 1865	4.00	A-	14.68		POL 380	American Foreign Policy	4.00	A	16.00	
ENG 101	Literature and Composition	4.00	A	16.00		POL 394	SpTp:Cont. Iss: Publ Policies	4.00	A	16.00	
PHL 111	Intro Comprtiv Religion:Western	4.00	A	16.00		*** Dean's List ***					
THE 211	Acting I	4.00	A	16.00		*** Dean's List ***					
Term GPA	3.917	Credit	16.00			Term GPA	4.000	Credit	16.00		
Cum GPA	3.918	Credit	16.00			SPRING 2016 (01/27/2016 to 05/13/2016)					
Cum GPA	3.883	Credit	68.00			SUMMER 2017 (05/30/2017 to 08/25/2017)					
GRW 101	Neuroethics	4.00	A	16.00		SBC 194	SBC:Freedom in Am Poltcl Life	4.00	A	16.00	
HIS 202	History of the U.S. Since 1865	4.00	A-	14.68		05/30/2017 to 06/17/2017					*
POL 323	Constitutional Law	4.00	A	16.00		POL 430	Oxford Seminar	4.00	A	16.00	
POL 104	Intro to World Politics	4.00	A	16.00		05/30/2017 to 07/20/2017					
*** Dean's List ***						Term GPA	4.000	Credit	8.00		
Cum GPA	3.895	Credit	76.00			Term GPA	3.917	Credit	16.00		
Cum GPA	3.918	Credit	32.00			FALL 2017 (08/28/2017 to 12/15/2017)					
BUS 334	Leadership	4.00	A	16.00		ECN 111	Principles of Macroeconomics	4.00	A+	16.00	
SUMMER 2016 (05/31/2016 to 08/26/2016)						POL 320	Law and Society	4.00	A	16.00	
PHL 394	SpTp: Washngtn Coll in Greece	4.00	A	16.00		BUS 111	Principles of Marketing	4.00	A+	16.00	
Term GPA	4.000	Credit	4.00			FALL 2016 (08/29/2016 to 12/16/2016)					
Cum GPA	3.927	Credit	36.00			Term GPA	4.000	Credit	16.00		
*** Dean's List ***						Cum GPA	3.913	Credit	92.00		
BIO 100	CurrTop: Diversity/Adaption	4.00	B	12.00		POL					
HIS 334	The American Civil War	4.00	A-	14.68		SPRING 2018 (01/22/2018 to 05/11/2018)					
POL 312	The American Presidency	4.00	A	16.00		*** Dean's List ***					MAT
331	History of Political Thought	4.00	A	16.00		POL 345	Comparative Gov't: East Asia	4.00	A-	14.68	
BUS 303	Legal Environment of Business	4.00	P	.....		ECN 112	Principles of Microeconomics	4.00	A-	14.68	
109	Statistics	4.00	A	16.00		Cum GPA 3.898 Credit 108.00					
Term GPA	3.667	Credit	16.00			Continued on next Column/Page					
Cum GPA	3.847	Credit	52.00			Continued on next Column/Page					
*** Dean's List ***											
Term GPA	3.780	Credit	16.00								
Continued on next Column/Page											
Page: 2 of 2											

Record of: Mr. Nicholas L. Roberti  
 Print Date: 03/17/20  
 Student ID: 3000642  
 DOB: 11-01

SSN: XXX-XX-4601

Released To :

Mr. Nicholas L. Roberti  
 26 E Lake Road  
 New Fairfield CT 06812-2554

Course	Title	Cred	Gr.	GR	Pt	Course	Title	Cred	Gr.	GR	Pt
FALL 2018 (08/27/2018 to 12/14/2018)						=====					
						ECN 211	Intermediate Macroeconomics	4.00	A	16.00	End of official record.
ECN 312	Public Finance	4.00	A	16.00							
POL 401	Empirical Political Research	4.00	A	16.00							
*** Dean's List ***											
Term	GPA	4.000	Credit	12.00							
	Cum	GPA 3.909	Credit	120.00							
SPRING 2019 (01/21/2019 to 05/10/2019)											
POL SCE	Senior Capstone Experience	4.00	A+	16.00							
ECN 215	Data Analysis I	4.00	A	16.00							
ECN 320	Econometrics	4.00	A	16.00							
*** Dean's List ***											
Term	GPA	4.000	Credit	12.00							
	Cum	GPA 3.917	Credit	132.00							
=====											
Degree Received: Bachelor of Arts on 05/10/2019						Date					
Conferred.: 05/19/2019											
Majors.....: Political Science											
Minors.....: Economics											
Honors.....: summa cum laude											
Political Science Award											
Dept Honors - Political Sci											
Senior Obligation/SCE Honors											
Pi Sigma Alpha											
Phi Beta Kappa											
Omicron Delta Kappa											
Omicron Delta Epsilon											
Senior											
Obligation/Capstone Information:											
*****											
Thesis Title: "An Evaluation of Justice Kennedy's											
Jurisprudence in Romer, Lawrence, and Obergefell"											

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April 21, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

RE: Clerkship Recommendation for Nicholas L. Roberti

Dear Judge McCarthy:

I highly recommend Nicholas Roberti for a clerkship in your court. Given Nick's performance in my class during his first year of law school and my personal interactions with him, I am confident that he would make an excellent judicial clerk.

When Nick asked if I would be willing to write a letter of recommendation for him, I didn't hesitate to say "yes." Nick has an inquisitive mind and loves thinking about difficult legal issues. He was an active participant in class discussions. Indeed, Nick is the kind of student who makes teaching a true pleasure.

My students write three progressively complex legal memoranda in the fall semester of their first year. Nick's performance on his first two memos was fine, but it was in the middle of the semester that things really clicked for him. As he told me, he developed a real love for legal writing around that time. He would often stop by my office to discuss with me his thoughts about how to best address the various issues in the final memorandum, which involved a number of particularly thorny issues. He soaked up my advice, and it was incredibly rewarding for me to not only experience his excitement but to witness such an improvement in his writing. His final memo was well analyzed and well written.

In the spring, my students write an appellate brief and present an oral argument based on the same issues as in the final fall memorandum. Nick's excitement and hard work once again paid off. In his brief, he artfully integrated the law and the facts to argue persuasively on behalf of his client. Furthermore, he was one of only three – out of over a hundred – of my students to receive a Best Oralist Award. His oral argument panel raved about his mastery of the case law and the Record, his thorough understanding of both the strong and weak points of his case, his ability to think on his feet due to his excellent grasp of the subject matter, and his responsiveness to questions from the court.

Since having him as a student two years ago, I have continued to stay in touch with Nick. I always enjoy our interactions -- his excitement about the law and about his future legal career is palpable.

As I hope you can tell, I have no reservations about recommending Nick for a clerkship in your court. He not only has impressive legal skills and an impressive work ethic, but also he is a mature individual with a truly wonderful personality. He is, simply put, such a pleasure to be around. I am certain that he would be an asset to your court.

Sincerely,

D. Ruth Buck

D. Ruth Buck - rbuck@law.virginia.edu - (434) 924-1042

April 21, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I write to highly recommend Nicholas Roberti as a clerk in your chambers. Nick was my research assistant during the summer of 2020.

Nick's assignment that summer was to stitch together three published papers written by myself and my colleague, Leopoldo Parada of the University of Leeds. Parada and I wanted to turn three short thought pieces about digital taxation into a longer academic article. The resulting article was entitled "The Legality of Digital Taxes in Europe," and published in the Virginia Tax Review.

As part of this assignment, Nick had to be judicious about what to include and what to leave out as compared to the three independent articles. The final product had to read as if written by a single person, which was difficult because Parada and I have very different writing styles. Nick did an excellent job at this assignment, and he was able to appropriately fill in background and interstitial material where it was needed in the article. To be specific, the thought pieces were published in tax journals targeted to savvy tax practitioners. But the article that Nick compiled was pitched to a general law audience. This required some Nick to identify places where he needed to fill in background and break down complex tax rules into digestible English, and he had to provide that missing content.

Particularly impressive was that Nick took on this assignment without any international tax background. So, before he could start on stitching our papers together, he first had to research digital taxes and international tax more generally, and then the current international relations dispute over digital tax. Nick is very eager and willing to learn; he asked a lot of good questions that showed that he really understood what was at stake and, more subtly, what the parties' interests were. I originally hired Nick to do constitutional law research; he did not have any special interest in international tax, but he approached the topic with genuine enthusiasm. The final product was a success—indeed, it was one of the most downloaded tax articles of 2020. I should add that my co-author, Leopoldo Parada, was also highly impressed with Nick, and I think he would have liked to hire Nick for the regular school year!

Nick works quickly, and he is not afraid of long hours. I would rank Nick's work ethic as among the highest I've seen in 15 years of teaching. He was also great about keeping us informed on the progress he was making, and he did not need a lot of direction or hand-holding. He sent us outlines, modified them with guidance from us, and finally began the iterative stitch-and-fill process. Throughout, he actively sought feedback so that he could modify and improve. I have never done this sort of composite article project before, but Nick made it painless.

On a more personal note, Nick has compelling personal reasons to be in Memphis, as his girlfriend will clerk for Judge Gibbons. Nick is affable and optimistic; he will be a well-liked member of your chambers. A true team player, Nick is an active member of the Law School community; he served as a Peer Advisor to 1L students who began their law school careers in the midst of a pandemic. Although Nick downplays the challenges associated with this role, I know that the Peer Advisors had an extraordinarily difficult job that year. Nick never complained about the extra psychological and time burdens, and he seemed genuinely glad to be there for his fellow students. He seeks a clerkship to hone his analytical and writing skills.

In short, I recommend Nick to you strongly and without reservation. If I can be of any further assistance in your review of her application, please feel free to contact me by phone or email.

Sincerely,

Ruth Mason

Ruth Mason - ruth.mason@law.virginia.edu - (434) 243-3531

April 22, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I am writing to recommend **Nicholas Roberti** highly for a clerkship.

I met Nick when he took my Law of the Police course during his third year of law school here at the University of Virginia. This upper-level course considers the web of interacting federal, state, and local laws that impose rules on police conduct. The course demands that students master both law and policy, and the exam requires analytic thinking and strong writing. Nick stood out immediately as more engaged and analytic than his peers. He contributed intelligently and sensitively, and his exam was strong. He earned an A- in the course.

I was so impressed with Nick that even before the semester ended, I asked whether he wanted to serve as my research assistant. Nick accepted. Rather than wait to start until he returned from the holidays, as I had expected, Nick asked for an assignment immediately. By the time the winter holidays were over, he was months ahead in the work. That has been the pattern since. He has written memo after memo on diverse legal subjects such as a draft Presidential executive order, statutes and cases on lawful orders, police department training on de-escalation, case law following an obscure 1960s Supreme Court case, and state statutes governing arrests. He has digested an enormous amount of messy doctrine, shown good judgment about what I need, and produced work remarkably quickly.

Not only is Nick's research and writing excellent and fast, but he excels in the spaces between the assignments as well. Nick keeps track of the work I mention, reminding me each week what we have done and what still is on the agenda. He talks through the memos with me in ways that further my thinking. He comes back to me appropriately for feedback and clarification, but also works well independently and does not require constant supervision or approval. He consistently follows up on loose ends. And the best part: He is always eager for more. I have had dozens of research assistants, and Nick stands out among the top 10%. I am so pleased with Nick's work that I have asked him to continue after he graduates, while he studies for the bar. Simply, Nick has many of the qualities of the best lawyers I knew in years as a prosecutor at the U.S. Department of Justice: he is proactive, reliable, and smart. Although Nick has performed solidly in law school, that performance radically understates how good a law clerk he will be.

Nick's strengths are personal as well as professional. I truly looked forward to seeing him in class. Now, I enjoy meeting with him regularly as my assistant. Recently, I had time-sensitive assignment that required him to coordinate and produce work with my two undergraduate research assistants, whom he had never met. He led the team in producing a memo within 24 hours, and the undergraduates gushed about working with him. He is easy to like, and he will be a positive presence in any chambers, getting along with others and treating all with respect.

As you can see, I am enthusiastic about Nick and recommend him strongly. Please let me know if I can be of any further assistance.

Sincerely,

Rachel Harmon  
Harrison Robertson Professor of Law  
Class of 1957 Research Professor of Law  
Director, Center for Criminal Justice  
University of Virginia Law School  
rharmon@law.virginia.edu  
(434) 924-7205  
fax: 434-924-7536

Rachel Harmon - rharmon@law.virginia.edu - (434) 924-7205

## Nicholas L. Roberti

2101 Arlington Blvd., Apt. 250-A, Charlottesville, VA 22903 • (203) 448-6327 • nlr9zn@virginia.edu

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### Writing Sample

The following sample is an excerpt from a brief that I wrote for my Legal Research and Writing class. I am using this excerpt with permission. This writing sample is my own work product and has not been substantially edited by any other person. I address two issues in this brief. First, I address whether a de minimis exception applies to claims of sound recording copyright infringement. Second, I identify the test that determines whether a sound recording copyright infringement claim falls below the de minimis threshold. For length and clarity, I have omitted the questions presented, factual background, and application of the de minimis standard to this claim.

My client is a teenage mash-up artist. Mash-ups are created by compiling dozens of samples to create a new song. My client sampled one word from the sound recording of a copyrighted song. He lowered the pitch, placed it in the background of his original beat, and repeated it twice in his song. He was sued by the record company that owns the sound recording copyright.

This case was brought in the Southern District of New York. The judge granted my client's Motion for Summary Judgment. This decision was appealed by the Appellant. This appeal presents an issue of first impression, as the Second Circuit has not yet addressed a claim of sound recording copyright infringement. I make three arguments on appeal. First, the trial court was correct in applying the de minimis exception to this claim of sound recording copyright infringement. Second, the "observability" test, which asks if a lay person would recognize the copying, should apply to determine whether these claims rise above the de minimis threshold. Third, my client's sampling was de minimis as a matter of law. The first two arguments appear in this brief.

ARGUMENT

## I. THE DE MINIMIS EXCEPTION APPLIES TO CLAIMS OF SOUND RECORDING COPYRIGHT INFRINGEMENT.

The trial court correctly held that the de minimis exception to copyright infringement applies in this case. To prevail on a copyright infringement claim, the Second Circuit has always held that a plaintiff must prove (1) factual copying, and (2) legal copying. *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999). To satisfy the requirement of “legal copying,” a plaintiff must show that their copyrighted work and the defendant’s work are “substantially similar.” *Id.* Substantial similarity exists where a lay audience could recognize the copied (original) work in the copying (sampling) work. *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (applying the substantial similarity standard to a claim of musical composition copyright infringement). The Second Circuit has always applied the de minimis exception to copyright law, which provides that if a copying is so trivial that it falls below this substantial similarity threshold, it will not constitute legal copying. *See TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 598 (S.D.N.Y. 2013) (applying the de minimis standard to a claim of musical composition copyright infringement); *see also Alexander v. Murdoch*, 502 Fed. Appx. 107, 109 (2d Cir. 2012) (applying the de minimis standard to a claim of dramatic work copyright infringement); *Lewinson v. Henry Holt and Co., LLC*, 659 F. Supp. 2d 547, 573 (S.D.N.Y. 2009) (applying the de minimis standard to a claim of literary work copyright infringement); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (applying the de minimis standard to a claim of choreographic work copyright infringement); *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (applying the de minimis standard to an infringement claim of copyrighted photographs).

As the trial court correctly noted, declining to apply the de minimis exception to this case would be a radical departure from established Second Circuit precedent. (R. at 11). The competing “per se” approach, adopted by only one circuit in the Nation, prohibits *any* use of a sound recording by anyone other than the sound recording copyright holder. *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005) (holding that no one may sample an “actual copy” of a copyrighted sound recording under any circumstance). Appellant has failed to cite a single instance in which this Court has applied a “per se” rule rather than the “de minimis” rule to a copyright infringement claim. As a matter of established precedent, the Second Circuit should continue to apply the de minimis exception to copyright law by applying it to this case.

A. The de minimis exception promotes the goals of copyright law.

This Court has long applied the de minimis exception to copyright infringement cases because it furthers the goals of copyright law. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Article I, Section 8, Clause 8 of the United States Constitution grants Congress the power “to *promote the Progress of . . . useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added). This phrase reflects competing principles of spurring innovation and protecting the interests of inventors. In balancing these competing interests, however, the Supreme Court of the United States has held that “copyright law . . . makes reward to the owner a secondary consideration.” *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948). In empowering Congress to grant exclusive rights to the copyright holder, the Copyright Clause primarily sought to spur innovation and creativity rather than reward the labor of the inventor. *See Daniel Esannason, Note, Get a License or Don’t Sample: Using Examples From*

*Popular Music to Raise New Questions About the* Bridgeport v. Dimension Films *Holding*, 29 HARV. J. L. AND TECH. 551, 552 (2016). In this Court’s own words, while the “de minimis doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying,” it remains “an important aspect of the law of copyright” because many honest innovators and artists would violate the law without such a protection. *Davis v. The Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001). This would, in turn, chill innovation. *See id.*

The de minimis principle strikes a sufficient balance between the two competing interests of copyright law. As articulated by the Ninth Circuit, “the Plaintiff’s legally protected interest is the potential financial return from his compositions which derive from the lay public’s approbation” of his work. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016). Thus, if the public does not recognize the original work in the copying work, the copier has not benefitted from the original artist’s expressive content. His action will therefore not constitute legally cognizable copying. *Id.* By sufficiently protecting the copyright holder’s financial interest in their work while not over-detering the new artist from innovating, the de minimis standard accomplishes these twin aims.

The de minimis exception is especially effective in promoting the goals of copyright law as applied to the sound recording industry. As in this case, it should apply to the new and exciting art form of “mash-ups.” (R. at 14). Artists creating mash-ups combine dozens of existing sound recordings, usually in segments “less than a few seconds long” and “often distorted” by sound technicians. (R. at 15). For example, a mash-up artist may take one word from a famous song, raise the pitch, and plug it in between dozens of other sound recordings playing at the same time. Rather than appropriating the original artist’s work, these sound recordings act merely as “building block[s]” in constructing a new and original song. (R. at 13).

However, many of these sound recordings are copyrighted. *Id.* Therefore, without the de minimis exception, artists must go through the costly and lengthy process of requesting permission for any use of copyrighted material, even if they use less than one second of the protected work. (R. at 15). As Appellant notes, artists are burdened with wait times between “eight to twelve weeks” for record companies to respond to *each* sound recording copyright request. (R. at 16). Even then, record companies may refuse permission to use the small, copyrighted portions. *Id.* Creating mash-ups in this environment is “almost impossible to do.” (R. at 18).

The de minimis exception will promote the goals of copyright law by fostering a creative environment for mash-up artists. This standard will allow artists to copy an insignificant portion of the protected work. Due to its insignificance, the sound recording copyright holder will not suffer a cognizable injury and the mash-up artist will not unduly benefit. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930); *see also VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 882 (9th Cir. 2016). Alternatively, if the de minimis standard does not apply to sound recording copyrights, the mash-up industry will likely cease to exist. Unlike record companies that own sound recording copyrights, mash-up artists are typically young, without counsel, and limited in financial resources. (R. at 4). For these artists, licenses are prohibitively burdensome to obtain given the time, sophistication, and money necessary to secure them. *Id.* Thus, if the de minimis standard does not apply, this ruling would be both a stark departure from established Second Circuit precedent, and would potentially ruin the mash-up industry. Such a result is contrary to the innovation-driven purpose of copyright law. This court should therefore apply the de minimis exception to sound recording copyright law.



B. There is no meaningful distinction between sound recording copyrights and other copyrights that would justify a departure from the substantial similarity test.

In addition to precedential and practical justifications for applying the de minimis exception to this case, there is also a logical justification: sound recordings are not meaningfully different than other forms of copyrighted work. Only one circuit has held that sound recordings deserve unique treatment. The Sixth Circuit held that because sound recording copyright infringement involves both “a physical taking rather than an intellectual one” and an “intentional [rather than] accidental” act, the infringer should be held liable without inquiry into the nature of the copying. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800–03 (6th Cir. 2005) (applying a per se rule rather than the de minimis exception to a claim of sound recording copyright infringement).

The Second Circuit, however, has previously held that neither of these justifications defeat the applicability of the substantial similarity standard. This Court has long held that “not all copying from copyrighted material is necessarily an infringement . . . .” *Attia v. Soc’y of New York Hosp.*, 201 F.3d 50, 53 (2d Cir. 1999). First, some “elements of a copyrighted work . . . are not protected even against *intentional* copying.” *Id.* (emphasis added). Second, the possibility of a “physical taking” exists with respect to other kinds of artistic work, such as photographs, as to which the usual de minimis rule applies in this Circuit. *See, e.g., Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998) (affirming summary judgment for the defendant because defendant’s use of plaintiff’s photographs in a movie was de minimis). Since the Sixth Circuit’s logic does not meaningfully differentiate sound recordings from other forms of copyrighted works to which this Court has applied the de minimis exception, this Court should apply the de minimis standard to this case.

C. The text and legislative history of the Copyright Act support the application of the de minimis exception.

Even if one were inclined to conclude that sound recording copyrights are meaningfully different from other forms of copyright, Congress chose to protect sound recordings in the same manner as other forms of copyrighted work. The Copyright Act treats sound recordings identically to all other types of protected work, with nothing in the text suggesting differential treatment. *See* 17 U.S.C. §§ 102, 106 (2020); *see also VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016). If Congress intended to distinguish sound recording copyrights from other forms of copyright in order to introduce a per se approach to copyright infringement, it presumably would have done so. *Id.* Because Congress failed to distinguish sound recordings from other forms of copyrighted work in those two sections, they should not be treated differently from each other.

One circuit, however, has held that Section 114(b) provides a textual basis for distinguishing the treatment of sound recording copyrights from other copyrights. *See Bridgeport Music, Inc.*, 410 F.3d at 800–01. The relevant part of Section 114(b) reads: “the exclusive rights of the owner of copyright in a sound recording . . . do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds.” 17 U.S.C. § 114 (2020) (emphasis added). According to the *Bridgeport* Court, this implies that so long as a work is *not entirely* created of independent sounds, this Section allows a sound recording copyright holder to sue for infringement. *Bridgeport Music, Inc.*, 410 F.3d at 803. In other words, de minimis copying is actionable because it is not entirely original.

There is one textual flaw and one logical flaw which, together, deliver a fatal blow to that argument. First, Section 114(b) is a provision within a section *limiting* the rights of copyright holders. It would be odd, indeed, that a section purporting to limit the copyright holder’s rights

would then significantly expand their rights. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 883 (9th Cir. 2016). This Court should therefore not “read an implicit expansion of rights into Congress’ statement of an express limitation on rights.” *Id.* Second, as the Ninth Circuit and the leading copyright treatise note, the Sixth Circuit engaged in the logical fallacy of inverse error, which means the Court erroneously inferred the inverse of a condition from the conditional.<sup>1</sup> *See VMG Salsoul, LLC*, 824 F.3d at 884; *see also* MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(A)(2)(b), at 13–61 (rev. ed.) (Lexis 2018). A natural reading of Section 114(b) suggests only that the rights of a sound recording copyright owner do not extend to an entirely original song. Thus, Section 114(b) does not suggest that a sound recording copyright holder’s rights are extended to every use of their sound recording copyright. This Court should therefore find that nothing in the language of Title 17 justifies a departure from the well-established principles of copyright law.

If the Court concludes that the text of Title 17 is ambiguous as to the scope of sound recording copyrights, the legislative history of Title 17 supports the conclusion that Congress displayed no intention to depart from the de minimis approach. The Judiciary’s Committee Report states that “infringement takes place whenever all or any *substantial* portion of the actual sounds that go to make up a copyrighted sound recording are reproduced . . .” H.R. REP. NO. 94–1476, at 106 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5721 (emphasis added). The language “any *substantial* portion” indicates that Congress did not intend to implement a per se standard with Section 114(b). If Congress intended to make this change, the Committee Report would instead say “any portion.” *See VMG Salsoul, LLC*, 824 F.3d at 883. Neither the text nor

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<sup>1</sup> For example, the premise “if the grass is dry, then it did not rain” does not warrant the conclusion “if it did not rain, then the grass will be dry.” The grass may be wet because someone watered the yard during a particularly dry summer. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 885 (9th Cir. 2016).

the legislative history of Title 17 purports to separate sound recording copyrights from other copyrights. As such, they do not support a departure from the de minimis standard.

II. TO ESTABLISH SUBSTANTIAL SIMILARITY, THE OBSERVABILITY TEST IS APPLICABLE IN CLAIMS OF SOUND RECORDING COPYRIGHT INFRINGEMENT.

To prevail on a claim of copyright infringement under the substantial similarity standard, a plaintiff must prove (1) factual copying and (2) legal copying. *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999). To prove legal copying, a defendant's copying must rise above the de minimis level. *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997). To rise above that level, substantial similarity must exist between the copying work and the protectable elements of the original work. *Id.* The leading test on this issue is the observability test, which deems two works substantially similar if an average lay observer would recognize the copyrighted (original) work in the copying (sampling) work. *Id.*

The trial court correctly held that the observability test applies to the instant case to determine substantial similarity. (R. at 12). This test has long applied in this Circuit. *See Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946). Further, it has applied to comparable copyright infringement claims since it evaluates the copying through the ear of the lay listener. *Id.* (applying the observability test to a claim of musical composition copyright infringement). It should therefore apply in this case.

A. The observability standard should apply to the instant case since it is always applied to sound-related copyright infringement claims.

The trial court's application of the observability standard to this case is consistent with the precedent of this Court, which has held that the proper standard for judging unlawful appropriation of sound-related copyrights is an evaluation of the ordinary lay listener rather than expert opinion. *See Arnstein*, 154 F.2d at 473 (applying the observability test to a claim of

musical composition copyright infringement). Because the copyright holder’s “legally protected interest is . . . his interest in the potential financial returns” from the lay audience’s approbation of his efforts, the question “is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.” *Id.* Put simply, if a lay audience can recognize the copied (original) work in the copying (sampling) work, then the two works are substantially similar. *See id.*

This Court should apply the same observability test to sound recording copyright infringement claims. Courts outside of this Circuit have cited *Arnstein* for the proposition that the observability test should apply to claims of sound recording copyright infringement. *See VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 881 (9th Cir. 2016) (holding that the correct test is the response of the ordinary lay listener). Because the application of the observability standard to this claim of sound recording copyright infringement finds support in the precedent of this Court as well as other jurisdictions, the Court should apply it to the instant case.

This precedential support is amplified by the similarity of sound recordings and another form of copyright to which this Court has applied the observability test. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998) (applying the observability test to copyrighted visual works). Sound recordings are similar to visual works in three ways. First, a sound recording sample often appears in the background of the copying song, similar to how the visual work in *Sandoval*, a photograph, appeared in the background of a television show. *Id.* Second, both visual works and sound recordings frequently appear in a distorted manner within the copying work. For instance, in *Sandoval*, the view of the visual work was obscured due to poor lighting and lack of camera focus. *Id.* In the instant case, the copied song appears in

Appellee's work with its pitch significantly lowered, with different samples playing at the same time, and at an inconspicuous point in the song. (R. at 20). Third, both forms of copyrighted work are observed by the average lay audience in a non-stationary manner. To illustrate this point, a person who views a painting does so in a stationary manner—meaning they are able to analyze the intricacies of the work as it remains still. However, the average lay observer of a television show (the “visual work”) observes it in a linear (non-stationary) manner, that is, from start to finish without pausing and meticulously observing every aspect of each frame. Similarly, a song must be observed linearly—it is impossible to both pause a song and continue to listen to it. Since the observability test applies to visual works copyright infringement claims, it should apply to sound recording copyright infringement claims as well.

Finally, the observability test aptly protects the two competing interests of copyright law: the protection of the copyright owner's work and the progress of the arts. Under the observability test, if an artist uses a copyrighted sample so inconspicuously that the average listener does not recognize it, then that listener will not be drawn away from the original song, and no harm will be suffered by the copyright holder. *See, e.g., Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946). Further, the copying artist will not realize an undue benefit because listeners will not flock to his song to enjoy the original work. *Id.* This is especially true in the mash-up industry, where artists rely on the “compilation of individually insignificant and unrecognizable” portions of other songs in order to create a new and unique piece of art. (R. at 15). With the copyright holder avoiding harm and the artist creating new work, the observability standard efficiently furthers the twin aims of copyright law and therefore should apply in this case.

## Applicant Details

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 Address

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Contact Phone Number **3139204135**

## Applicant Education

BA/BS From **University of Michigan-Ann Arbor**  
 Date of BA/BS **May 2015**  
 JD/LLB From **Georgetown University Law Center**  
[https://www.nalplawschools.org/employer\\_profile?FormID=961](https://www.nalplawschools.org/employer_profile?FormID=961)  
 Date of JD/LLB **May 22, 2022**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Georgetown Law Journal**  
 Moot Court Experience **No**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/  
Externships      **No**  
Post-graduate Judicial  
Law Clerk      **No**

## **Specialized Work Experience**

### **Recommenders**

Heinzerling, Lisa  
heinzerl@law.georgetown.edu  
Lopez, Jeffrey  
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### **References**

Peter Wilson, partner, supervised my work at Katten Muchin  
Rosenman, (312) 902-5649  
Tracy Price, supervisor at SEC, (202) 551-4500  
Brian Mitchell, supervisor at SS&C Eze, (617) 316-1000

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**



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April 25, 2022

The Honorable Magistrate Judge Judith C. McCarthy  
United States District Court for the Southern District of New York  
The Hon. Charles L. BRIANT Jr. Federal Building and United States Courthouse  
300 Quarropas St  
White Plains, NY 10601

Dear Judge McCarthy:

I am a third-year student at the Georgetown University Law Center and an editor on *The Georgetown Law Journal*. I am writing to apply for a clerkship in your chambers for the 2023-2024 term, at which time I will have worked for a year as a litigator at Katten Muchin Rosenman. I am planning on relocating to New York with my partner, who is moving there following her judicial clerkship.

During the fall semester of my 3L year, I developed a passion for legal writing from my Writing for Law Practice class, in which I learned to research and write efficiently, and adapt my writing style to different legal writing tasks, including briefs, motions, client letters, and internal memoranda. The most rewarding experience in that class for me was drafting summaries of a particular area of law in a non-adversarial setting because I particularly enjoyed stating the law accurately yet objectively. Further, my time as an editor on *The Georgetown Law Journal* has sharpened my attention to detail and honed my ability to write and organize for clarity.

Before starting law school, I worked for four years in a fast-paced environment at a software company, where I balanced competing priorities while solving novel and complex problems for clients. During my 1L summer internship at the Securities and Exchange Commission, I drafted questions ahead of whistleblower interviews, created factual chronologies from information gleaned from discovery, and wrote internal memoranda applying my legal research to the facts of the investigation. Last summer, as a summer associate at Katten, I performed extensive legal research in the areas of contract, tort, and securities law, and I wrote internal memoranda and client letters based on my findings.

My resume, transcripts, and writing sample are enclosed for review. Letters of recommendation from Professors Lisa Heinzerling and Jeffrey Lopez will arrive under separate cover. Should you require additional information, please do not hesitate to let me know.

Sincerely,

Dillon Rodriguez

## Dillon Lee Rodriguez

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### EDUCATION

#### GEORGETOWN UNIVERSITY LAW CENTER, Washington, DC

*Juris Doctor*, Expected May 2022

GPA: 3.70

Journal: *The Georgetown Law Journal*, Executive Online Editor, Volume 110

Honors: Dean's List, Spring 2021

Activities: Latin American Law Students Association (LALSA)

#### UNIVERSITY OF MICHIGAN, Ann Arbor, MI

*Bachelor of Science* in Environmental Science, May 2015

Minor: Applied Statistics

### PROFESSIONAL EXPERIENCE

#### KATTEN MUCHIN ROSENMAN LLP, Chicago, IL

May 2021–July 2021

*Summer Associate (return offer extended in the Financial Markets Litigation and Enforcement group)*

- Wrote internal memorandum summarizing United States courts of appeals' current interpretations of certain statutory provisions.
- Researched the applicability of novel claims to shareholder derivative suits.
- Performed multi-jurisdictional case law research in preparation for arbitration panels for client and sent findings in letter to client.
- Wrote memorandum comparing tests for certain tort and contract law concepts among three state jurisdictions.
- Researched case law on courts' interpretations of certain contractual provisions and wrote memorandum for supervising partner.
- Partnered with Legal Aid Chicago to assist low-income individuals with probate matter.

#### U.S. SECURITIES AND EXCHANGE COMMISSION, Washington, DC

May 2020–July 2020

*Honors Legal Intern, Division of Enforcement—Foreign Corrupt Practices Act Unit*

- Investigated two U.S. issuers for violations of the Anti-Bribery provision of the FCPA.
- Reviewed and analyzed legal documents including emails, contracts, spreadsheets, phone records, and other financial documents; organized documents by content and relevance; synthesized factual information into chronologies.
- Performed legal research on theories of agency as they relate to the FCPA; conducted open-source research on individuals of interest in investigations; wrote internal memoranda detailing findings.
- Attended and took notes during interviews of fact witnesses; participated in joint-investigation meetings with attorneys from Department of Justice, Homeland Security Investigations, and Federal Bureau of Investigation.

#### SS&C EZE, Chicago, IL

July 2015–Aug. 2019

*Product Solutions Engineer*

- Analyzed adverse impacts of software enhancements on clients' workflows; presented findings in written memoranda addressed to clients' senior executive management.
- Led a team of five Client Solutions Analysts; oversaw team members' work products, evaluated performance for semi-annual reviews, onboarded new hires, composed training materials, and led daily reporting meetings.
- Co-managed a compliance project analyzing evolving regulations; gathered requirements, oversaw internal testing, and gave status report presentations to management.
- Served as the subject matter expert on electronic trading for hedge fund and corporate clients.
- Researched SEC and FINRA regulatory requirements pertaining to trading and capital markets.

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Dillon L. Rodriguez  
GUID: 807467589

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center  
Juris Doctor  
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	94	Civil Procedure Kevin Arlyck	4.00	A-	14.68	
LAWJ	002	42	Contracts Anupam Chander	4.00	B	12.00	
LAWJ	004	94	Constitutional Law I: The Federal System Laura Donohue	3.00	B	9.00	
LAWJ	005	41	Legal Practice: Writing and Analysis Jonah Perlin	2.00	IP	0.00	
				EHrs	QHrs	QPts	GPA
Current				11.00	11.00	35.68	3.24
Cumulative				11.00	11.00	35.68	3.24
Spring 2020							
LAWJ	003	42	Criminal Justice Rosa Brooks	4.00	P	0.00	
LAWJ	005	41	Legal Practice: Writing and Analysis Jonah Perlin	4.00	P	0.00	
LAWJ	007	94	Property Sheila Foster	4.00	P	0.00	
LAWJ	008	94	Torts Gary Peller	4.00	P	0.00	
LAWJ	1323	50	International Law, National Security, and Human Rights Milton Regan	3.00	P	0.00	
Mandatory P/F for Spring 2020 due to COVID19							
				EHrs	QHrs	QPts	GPA
Current				19.00	0.00	0.00	0.00
Annual				30.00	11.00	35.68	3.24
Cumulative				30.00	11.00	35.68	3.24
Fall 2020							
LAWJ	121	09	Corporations Donald Langevoort	4.00	A-	14.68	
LAWJ	165	05	Evidence Michael Gottesman	4.00	A-	14.68	
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems Kevin Arlyck	2.00	A-	7.34	
LAWJ	396	10	Securities Regulation Barry Summer	2.00	A	8.00	
LAWJ	950	08	Complex Securities Investigations Kevin Muhlendorff	2.00	A-	7.34	
				EHrs	QHrs	QPts	GPA
Current				14.00	14.00	52.04	3.72
Cumulative				44.00	25.00	87.72	3.51

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1298	08	Global Anti-Corruption Seminar Robert Luskin	2.00	A+	8.66	
LAWJ	1349	08	Administrative Law Lisa Heinzerling	3.00	A	12.00	
LAWJ	1652	05	Criminal Justice II: Criminal Trials Michael Gottesman	3.00	A-	11.01	
LAWJ	178	05	Federal Courts and the Federal System David Vladeck	3.00	P	0.00	
LAWJ	317	07	Negotiations Seminar Stephen Altman	3.00	A-	11.01	
Dean's List Spring 2021							
				EHrs	QHrs	QPts	GPA
Current				14.00	11.00	42.68	3.88
Annual				28.00	25.00	94.72	3.79
Cumulative				58.00	36.00	130.40	3.62
Fall 2021							
LAWJ	1104	08	Writing for Law Practice Jeffrey Lopez	2.00	A	8.00	
LAWJ	1352	05	Pursuing Fraud Against the Government: A Model of Complex Civil Litigation Stuart Rennert	3.00	A	12.00	
LAWJ	146	08	Environmental Law Lisa Heinzerling	3.00	A	12.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	P	0.00	
LAWJ	361	03	Professional Responsibility Stuart Teicher	2.00	A	8.00	
				EHrs	QHrs	QPts	GPA
Current				14.00	10.00	40.00	4.00
Cumulative				72.00	46.00	170.40	3.70
Spring 2022							
In Progress:							
LAWJ	037	08	Immigration Law and Policy Capital Punishment Seminar	3.00	In Progress		
LAWJ	090	05	Capital Punishment Seminar	3.00	In Progress		
LAWJ	1245	09	Trial Practice and Applied Evidence	3.00	In Progress		
LAWJ	134	05	Decedents' Estates	4.00	In Progress		
Transcript Totals							
				EHrs	QHrs	QPts	GPA
Current				14.00	10.00	40.00	4.00
Annual				72.00	46.00	170.40	3.70
Cumulative				72.00	46.00	170.40	3.70

-----End of Juris Doctor Record-----

THE UNIVERSITY OF MICHIGAN - ANN ARBOR  
Unofficial Transcript - Not an Official Transcript

Rodriguez,Dillon Lee  
UM ID: 69642323 UIC: 0995782265  
Uniqname: DRODDDD

Page 1  
Date: Feb 23, 2022

Citizen: U.S. Citizen						Winter 2012	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
						ANTHRBIO 366	Human Evol Anatomy	B-	4.00	4.00	4.00	10.80
						ANTHRCUL 370	Lang&Discrim	C+	3.00	3.00	3.00	6.90
Rodriguez,Dillon Lee (313) 920-4135						CHEM 125	Gen Chem Lab I	B-	1.00	1.00	1.00	2.70
8450 Valley Vw						CHEM 126	Gen Chem Lab II	B-	1.00	1.00	1.00	2.70
South Lyon, MI 48178						CHEM 130	G Chem&R Princ	B-	3.00	3.00	3.00	8.10
United States						SOC 100	Intro to Sociology	C+	4.00	4.00	4.00	9.20
Previous Names:						Term Total	GPA: 2.525		16.00	16.00	16.00	40.40
Rodriguez,Dillon L						Cumulative Total	GPA: 3.061		27.00	32.00	83.20	
University of Michigan Degrees Awarded						Spring 2012	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
School/College: Literature, Sci, and the Arts and Natural Resources & Environment*						PSYCH 111	Intro Psych	B	4.00	4.00	4.00	12.00
Major: Environment						RELIGION 280	Jesus&Gospel	B+	3.00	3.00	3.00	9.90
Minor: Applied Statistics						Term Total	GPA: 3.128		7.00	7.00	7.00	21.90
Degree: Bachelor of Science						Cumulative Total	GPA: 3.091		34.00	39.00	105.10	
Awarded: 21-Aug-2015						Fall 2012	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
Fall 2011 Undergraduate L S & A						ASTRO 115	Intro Astrobiology	B+	3.00	3.00	3.00	9.90
Transfer Test Credit						COMM 102	Process & Effects	C+	4.00	4.00	4.00	9.20
Advanced Placement						ENVIRON 201	Ecological Issues	B	4.00	4.00	4.00	12.00
MATH 120 AP Calculus Credit I						POLISH 215	Poland Today	A-	3.00	3.00	3.00	11.10
						Term Total	GPA: 3.014		14.00	14.00	14.00	42.20
						Cumulative Total	GPA: 3.068		48.00	53.00	147.30	
Undergraduate L S & A						Winter 2013	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
Transfer Credit Accepted:						BIOLOGY 171	Intro Biology: EEB	C	4.00	4.00	4.00	8.00
						ECON 101	Principle Econ I	C	4.00	4.00	4.00	8.00
Fall 2011 Undergraduate L S & A						EECS 182	Bldg Apps for Inf Env	C-	4.00	4.00	4.00	6.80
ANTHRCUL 101 Intro Anthro						Term Total	GPA: 1.900		12.00	12.00	12.00	22.80
PHYSICS 112 Cosmology						Cumulative Total	GPA: 2.835		60.00	65.00	170.10	
RCCORE 100 First Year Sem						Spring 2013	Undergraduate L S & A	Grade	Hours	MSH	CTP	MHP
						ECON 102	Principle Econ II	W	3.00	0.00	0.00	0.00
						POLSCI 300	Contemp Issues	B	4.00	4.00	4.00	12.00
						U.S. Politics and the "Millennial" Generation						
WRITING 100 Transit Coll Writing						Term Total	GPA: 3.000		7.00	4.00	4.00	12.00
Term Total						Cumulative Total	GPA: 2.845		64.00	69.00	182.10	
Cumulative Total												

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Rodriguez, Dillon Lee  
UM ID: 69642323 UIC: 0995782265  
Uniqname: DRODDDD

Page 2  
Date: Feb 23, 2022

Fall 2013 Undergraduate L S & A							Spring 2015 Undergraduate L S & A						
Grade	Hours	MSH	CTP	MHP			Grade	Hours	MSH	CTP	MHP		
EARTH 118	Intr Geol Lab	B	1.00	1.00	1.00	3.00	EEB 381	General Ecology	B	5.00	5.00	5.00	15.00
EARTH 119	Intro Geology	A-	4.00	4.00	4.00	14.80	Term Total		GPA: 3.000	5.00	5.00	5.00	15.00
ENVIRON 412	Environ in Pub Pol	B+	3.00	3.00	3.00	9.90	Cumulative Total		GPA: 3.035	127.00	132.00	385.50	
	Upper Level Writing Requirement Satisfied												
STATS 250	Intr Stat&Data Anlys	B+	4.00	4.00	4.00	13.20	Academic Statistics for Undergraduate L S & A			MSH	CTP	MHP	
Term Total			12.00	12.00	12.00	40.90	Total to Date		GPA: 3.035	127.00	132.00	385.50	
Cumulative Total			76.00	81.00	223.00								
Winter 2014 Undergraduate L S & A													
Grade	Hours	MSH	CTP	MHP									
ENVIRON 207	Sust & Society	B+	3.00	3.00	3.00	9.90							
ENVIRON 310	Env Chem&Dis	B-	3.00	3.00	3.00	8.10							
ENVIRON 397	Internship Prep	B-	1.00	1.00	1.00	2.70							
HISTORY 244	Arab-Israeli Conflc	A-	4.00	4.00	4.00	14.80							
STATS 401	Appl Stat Meth II	B	4.00	4.00	4.00	12.00							
Term Total			15.00	15.00	15.00	47.50							
Cumulative Total			91.00	96.00	270.50								
Spring 2014 Undergraduate L S & A													
Grade	Hours	MSH	CTP	MHP									
ITALIAN 315	Cinema&Society	B	3.00	3.00	3.00	9.00							
Term Total			3.00	3.00	3.00	9.00							
Cumulative Total			94.00	99.00	279.50								
Summer 2014 Undergraduate L S & A													
Grade	Hours	MSH	CTP	MHP									
EARTH 344	Sust Fossil Energy	A-	3.00	3.00	3.00	11.10							
Term Total			3.00	3.00	3.00	11.10							
Cumulative Total			97.00	102.00	290.60								
Fall 2014 Undergraduate L S & A													
Grade	Hours	MSH	CTP	MHP									
ARCH 423	Int U P&Env	B+	3.00	3.00	3.00	9.90							
ENVIRON 380	Min Res, Econ&Envir	B+	4.00	4.00	4.00	13.20							
	Upper Level Writing Requirement Satisfied												
SPANISH 232	Second Year Span	B	4.00	4.00	4.00	12.00							
STATS 408	Stat Prin Prob Solv	A	4.00	4.00	4.00	16.00							
Term Total			15.00	15.00	15.00	51.10							
Cumulative Total			112.00	117.00	341.70								
Winter 2015 Undergraduate L S & A													
Grade	Hours	MSH	CTP	MHP									
ENVIRON 361	Psy Env Stewardship	B+	3.00	3.00	3.00	9.90							
STATS 449	Topics in Biostat	B-	3.00	3.00	3.00	8.10							
STATS 480	Survey Sampling	B-	4.00	4.00	4.00	10.80							
Term Total			10.00	10.00	10.00	28.80							
Cumulative Total			122.00	127.00	370.50								

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**Program Action History:** Lit, Sci, and the Arts UG Deg

09/09/2015 Completion of Program  
Environment BS  
09/09/2015 Completion of Program  
Minor -Applied Statistics BS  
12/01/2014 Plan Change  
Environment BS  
12/01/2014 Plan Change  
Minor -Applied Statistics BS  
12/01/2014 Plan Change  
Environment BS  
12/01/2014 Plan Change  
Minor -Applied Statistics BS  
12/01/2014 Plan Change  
Residential College  
11/25/2014 Plan Change  
Anthropology BS  
11/25/2014 Plan Change  
Environment BS  
11/25/2014 Plan Change  
Minor -Applied Statistics BS  
11/25/2014 Plan Change  
Residential College  
02/20/2014 Plan Change  
Anthropology BS  
02/20/2014 Plan Change  
Environment BS  
02/20/2014 Plan Change  
Minor -Applied Statistics BS  
02/20/2014 Plan Change  
Residential College  
12/18/2013 Plan Change  
Anthropology BS  
12/18/2013 Plan Change  
Minor -Applied Statistics BS  
12/18/2013 Plan Change  
Residential College  
01/11/2012 Plan Change  
Anthropology BS  
01/11/2012 Plan Change  
Residential College  
07/07/2011 Plan Change  
LSA Undeclared  
07/07/2011 Plan Change  
Residential College

03/02/2011 Matriculation  
Residential College

**Remarks**

\*Degrees with a specialization in The Environment are jointly conferred by the School of Natural Resources and the Environment and the College of Literature, Science, and the Arts.

**Academic Previous Experience**

Crestwood High School MI, United States  
High School Diploma 06/04/2011

Fall 2011 RCCORE 100 First Year Sem  
Hernandez, Lolita

The first year seminar class, The Trials and Tribulations of Harry Potter, explored the heroic struggles of Harry Potter and others to secure peace and harmony for the world of wizards and muggles alike. Through a study of the series students considered the possibility of heroic moral conviction as a magical solution to the overwhelming issues that follow the global community from the twentieth century, when Potter first saw print, to the twenty-first century. Readings consisted of essays from The Ultimate Harry Potter and Philosophy, as well as essays by Jorge Luis Borges, in addition to the Harry Potter books. The writing consisted of one 4-page panel presentation and three 2-page critiques of panel presentations. The final paper was 8-10 pages and explored some aspect of themes that emerge from the Harry Potter series. All work on papers included revising drafts as necessary. In addition, students were expected to share work in class, as well as participate in creative, in-class writing exercises. Grades were based on completion of all papers and revisions, class attendance, and class participation.

Dillon Rodriguez completed all assignments in a timely manner, including revisions as needed. His panel paper, "The Development and Dynamic of Harry Potter," examines the theme of coming of age so prevalent in the series and so relevant to the original Harry Potter fans, as they came of age with the main characters of the series. Dillon's final paper, "Harry Potter in Many Cultural Perspectives," reviews primarily the evangelical Christian opposition to the books, concluding that Harry Potter will live on, no matter who opposes the series because, "You can't run out of magic." Otherwise, Dillon's three panel critiques reflect attentiveness to the panel presentations and engagement with the issues. He contributed regularly to class discussions and writing exercises.

End of Unofficial Transcript



Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

April 25, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I am writing to recommend Dillon Rodriguez for a judicial clerkship with you.

Dillon is a third-year law student at Georgetown. I have come to know him because he was a student in my Administrative Law class last spring and in my Environmental Law class last fall. My Administrative Law class is so large (it always has more than 100 students) that I have, with some sheepishness, taken to assessing students based on midterm quizzes and a final exam which consist entirely of true-false and multiple-choice questions. Dillon received an A in the course and an almost perfect score on the final exam, demonstrating an admirable command of the subject matter. In Environmental Law, in which I give a traditional essay-style exam, Dillon again earned an A. Dillon's written exam was, as these things go, beautiful – smart, knowledgeable, sure-footed, and crystal-clear. I especially appreciated how he, virtually alone among the 50-plus students in the class, caught and analyzed a strange (but intended) quirk in one of the fact patterns. His exam showed a nimble turn of mind paired with a lawyer's attention to detail.

A glance at Dillon's resume reveals that Dillon's academic performance has been just as impressive in his other courses at Georgetown. He has a very fine overall grade point average of 3.7 and, just as notably and despite a rigorous course load, all of the letter grades he has received since first year have been of the "A" variety (one A+, six A's, six A-'s). He is the Executive Online Editor of our flagship law review, the Georgetown Law Journal. While in law school, he has burnished his skills in legal research and writing by working as a summer associate with the Chicago law firm of Katten Muchin Rosenman and as an honors legal intern for the Securities and Exchange Commission. In a seminar on anti-corruption in the global context, Dillon wrote a substantial research paper critiquing a case decided by the Second Circuit under the Foreign Corrupt Practices Act. He earned an A+ on this paper, and I can see why. It is a masterpiece of careful legal analysis yet at the same time a fine piece of legal persuasion. Dillon reports that he poured his all into that paper, and it shows.

Dillon's path to law school was quite remarkable. He comes from a working-class household in which only one parent has even a high school degree. Like many others, his family lost their home during the subprime mortgage crisis of the 2000s. Dillon earned a degree in environmental science (with a minor in applied statistics) from the University of Michigan, and after that he worked for four years for a Chicago company that made trading software for hedge funds. He became disturbed by what he saw as legally and morally questionable practices at the firm. This spurred him, for the first time, to consider law school. In law school, he has not only nurtured his interest in one day helping to root out financial fraud, but he has also discovered that he simply loves a good legal question. He relishes legal ambiguity, takes care not to overclaim, and persists until he sees the full dimension of the problem in front of him. He would make an outstanding law clerk.

I hope that this letter is helpful to you in considering Dillon's application for a clerkship. Please let me know if I can be of any further assistance.

Sincerely,

Lisa Heinzerling

Lisa Heinzerling - heinzerl@law.georgetown.edu



Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

April 25, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I write to enthusiastically support Dillon Rodriguez's application to serve as your law clerk. Dillon was the top student in my Writing for Law Practice class at Georgetown during the Fall 2021 term and I have stayed in contact with him during the Spring semester, suggesting that he use his talents to pursue a judicial clerkship to start his legal career.

Writing for Law Practice prepares upper division law students for practical writing in a law firm or judicial setting by allowing them to work on a single simulated case throughout the semester. Students are required to write five substantive legal documents: an internal case assessment memorandum; a client letter; a legal research memoranda; a collaborative mediation statement; and a lengthy substantive brief, in Dillon's case, an opposition to a motion for preliminary injunction. In addition, students represented their clients at a virtual mediation.

Dillon combines an analytical and detailed approach to legal writing with a humble, yet inquisitive personality that was always seeking to improve his craft. His work throughout the course was consistently excellent, setting an example for his peers and engaging me to explore techniques to sharpen his already high-level writing. Dillon researched complex legal matters and effectively communicated his analysis and application of case law to our fact pattern. His writing is direct and succinct, skillfully applies precedent and, where appropriate, distinguishes authority. He also demonstrated a talent for adapting his writing to a particular purpose and audience, informing or persuading depending on the task.

As part of the course, I had several individual meetings with Dillon to discuss his writing and professional goals. I always enjoy my conversations with Dillon; he is thoughtful, friendly and has a maturity and depth to him that is uncommon even among the talented law students at Georgetown. Despite his keen intellect, he is understated, rather than boastful or overconfident. His presentation at the mediation, which involved responding to probing legal and factual questions, as well as practical inquiries regarding the costs and benefits of settling the case, was cogent, detailed, and professional.

Writing for Law Practice provides me the opportunity to work closely with my students. Over the nine years I have taught the class, Dillon ranks among the very top students I have instructed. He is methodical, takes great pride in his work and works well with others. I would gladly have him on any litigation or deal team.

Dillon is well prepared to be an excellent law clerk. He will provide chambers with legal insight, oral and written talent, and attention to detail. I offer Dillon my strongest recommendation and look forward to his long and successful legal career.

Best regards,

Jeffrey J. Lopez  
Adjunct Professor  
Georgetown University Law Center

Jeffrey Lopez - jeffrey.lopez@georgetown.edu - 202-957-6621

**Dillon Lee Rodriguez**

313.920.4135 | dlr88@georgetown.edu  
1762b T St NW, Washington, DC 20009

The following writing sample is from the argument section of a brief in support of a motion opposing a preliminary injunction that I submitted for my Writing for Law Practice class. A summary of the relevant facts is as follows. The brief concerns a fictional pharmaceutical sales representative named Halston Leggett being sued by her former employer, PHC, for breach of a non-compete agreement following her beginning to work for a competing pharmaceutical company, RX. The non-compete forbids Ms. Leggett from marketing drugs “similar to” the drugs she marketed while working for PHC. At PHC, Ms. Leggett marketed an antidepressant called Aura. At RX, Ms. Leggett currently markets an ADHD medication called Targetall, which PHC has argued is “similar to” Aura because it can be prescribed “off-label” to treat certain forms of depression.

The length of this writing sample has been reduced to meet the requirements of the application, and references to exhibits have been omitted. This writing sample has not been edited by anyone other than me.

## LEGAL ARGUMENT

A plaintiff seeking a preliminary injunction must establish, among other factors, (I.) that he is likely to succeed on the merits and (II.) that he is likely to suffer irreparable harm in the absence of preliminary relief.<sup>1</sup> The Supreme Court has characterized a preliminary injunction as “an extraordinary remedy” that may only be awarded upon a “clear showing” that the plaintiff is entitled to such relief.<sup>2</sup> PHC has not made such a “clear showing” here.

### **I. PHC Is Not Likely to Succeed on the Merits.**

PHC is not entitled to a preliminary injunction because it cannot show that the non-compete is enforceable, or, to the extent that it is enforceable, that the non-compete has been breached.<sup>3</sup>

#### **a. The Non-Compete Is Not Enforceable Because it Lacks Valuable Consideration and Contains Overbroad Provisions.**

To be enforceable under North Carolina law, a non-compete must be: (1) in writing, (2) made part of an employment contract, (3) based on valuable consideration, (4) reasonable as to time and territory, and (5) no more restrictive than necessary to protect the employer’s legitimate business interest.<sup>4</sup> The non-compete is unenforceable because (i.) it was not based on valuable consideration, and (ii.) the terms are unreasonably restrictive and thus overbroad.

#### **i. The Non-Compete Lacks Consideration Because Ms. Leggett’s Pay Raise and Promotion Were Merit-Based Rewards.**

If an employee does not enter into a non-compete at the outset of her employment, any subsequent non-compete must be supported by consideration beyond the promise of continued employment to be enforceable.<sup>5</sup> The benefits the employee receives subsequent to signing the non-

<sup>1</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>2</sup> *Id.* at 22.

<sup>3</sup> *See VisionAIR, Inc. v. James*, 606 S.E.2d 359, 363 (N.C. Ct. App. 2004) (requiring moving party to demonstrate enforceability and breach of a non-compete in order to show likely success on the merits).

<sup>4</sup> *See Med. Staffing Network, Inc. v. Ridgway*, 670 S.E.2d 3231, 327 (N.C. Ct. App. 2009). Courts identify a failure on the fifth element as overbreadth. *See id.*

<sup>5</sup> *Kinesis v. Hill*, 652 S.E.2d 284, 292–93 (N.C. Ct. App. 2007). North Carolina courts have held the

compete must be related to and in exchange for the non-compete to constitute consideration.<sup>6</sup> If such benefits are merit-based or consistent with other periodic pay raises, then those benefits are not related to the non-compete, the non-compete was not supported by consideration, and the agreement is thus unenforceable.<sup>7</sup>

In *Mastrom*, an employee who had been in his job for three years accepted a raise that was conditioned upon his signing a non-compete.<sup>8</sup> However, the court explained that the increase in the employee's compensation was not dependent on whether he had signed the non-compete; rather, it was a discretionary, merit-based pay increase consistent with other periodic raises he had normally received during the course of his employment.<sup>9</sup> The court concluded that the raise was not related to the non-compete, and held that the non-compete was unenforceable due to absence of consideration.<sup>10</sup>

The facts of Ms. Leggett's case are similar to *Mastrom*, except that the facts here support the inference that there was not consideration even more strongly than the facts in *Mastrom*. As in *Mastrom*, Ms. Leggett's non-compete was executed during her employment, so it must be supported by additional consideration to be enforceable. At first glance, it would appear that the non-compete was supported by additional consideration because after the meeting in which she signed it, she had a higher salary and a new job title. However, Ms. Leggett's pay raise and

---

following benefits all constitute additional consideration: continued employment for a stipulated amount of time; a raise, bonus, or other change in compensation; a promotion; additional training; uncanceled shares; or some other increase in responsibility or number of hours worked. *Hejl v. Hood, Hargett & Assocs.*, 674 S.E.2d 425, 428–29 (N.C. Ct. App. 2009) (citations omitted).

<sup>6</sup> See *Mastrom, Inc. v. Warren*, 196 S.E.2d 528, 530 (N.C. Ct. App. 1973); *James C. Greene Co. v. Kelley*, 134 S.E.2d 166, 168 (N.C. Ct. App. 1964) (“While the defendant from time to time received increases in salary, the evidence fails to relate any of them to the covenant not to compete. The new contract with the restrictive covenant was without consideration—hence invalid.”).

<sup>7</sup> See *Mastrom*, 196 S.E.2d at 530; *Kelley*, 134 S.E.2d at 168.

<sup>8</sup> *Mastrom*, 196 S.E.2d at 529.

<sup>9</sup> *Id.* at 530.

<sup>10</sup> *Id.*

promotion were not bargained for and were unrelated to her signing the non-compete. Instead, those benefits were merit-based rewards for past performance and were in line with typical raises and promotions at PHC.

First, Ms. Leggett was informed that promotions and compensation at PHC were tied to performance and that successful salespeople could expect promotions. The meeting in which Ms. Leggett signed the non-compete was in line with those expectations. The meeting began with Mr. Wilson informing Ms. Leggett that she had been promoted and was going to receive a new-salesperson-of-the-year award. There was no mention of a non-compete until the end of the meeting. When the subject of a non-compete finally was introduced, Ms. Leggett was never told that she was required to sign it in order to keep her promotion; she was only *asked* to sign it because it was missing from her file.

Second, just as in *Mastrom*, her raise and promotion were in line with other periodic raises and promotions. Ms. Leggett received the same \$2,000 raise in 2020 as she did after she signed the non-compete in 2019, and it is expected for Junior Sales Representatives to be promoted within the first two years at PHC. Third, unlike in *Mastrom*, where a pay raise was explicitly conditioned on a non-compete—which the court there still did not find to constitute additional consideration—compensation was not even mentioned during Ms. Leggett’s meeting with Mr. Wilson, and she only learned that her salary had been increased after she happened to notice a higher paycheck amount weeks later. Fourth, unlike in *Mastrom*, where the benefits were referenced in the non-compete, the non-compete here is silent on both compensation and job title. Therefore, the non-compete was not supported by additional consideration, and is thus unenforceable.

Although Ms. Leggett eventually received increased job responsibilities and greater access to confidential information, including trade secrets, those changes are inherent to any promotion

to Sales Representative, and there was no indication at the meeting that Ms. Leggett would only receive them if she signed the non-compete. Therefore, those changes to Ms. Leggett's role did not constitute additional consideration because they were neither bargained for nor were they related to the non-compete.

**ii. The Non-Compete Is Unenforceable Due to Overbreadth.**

In North Carolina, non-compete agreements must be narrowly tailored to a legitimate business interest.<sup>11</sup> If a non-compete forbids an employee from soliciting her former employer's customers with whom the employee did not actually have contact during her former employment, then it is unenforceable due to overbreadth.<sup>12</sup> Similarly, if a non-compete places a prohibition on the employee with respect to potential clients of her former employer, then it is unenforceable due to overbreadth.<sup>13</sup> The non-compete forbids Ms. Leggett from soliciting "any person who is . . . a customer" of PHC, diverting or attempting to divert "any business" from PHC, and "interfer[ing]" with PHC and its business partners. These provisions are unenforceable due to overbreadth because they do not limit the prohibitions to PHC customers with whom Ms. Leggett actually had contact.<sup>14</sup>

The blue-pencil rule cannot save the unenforceable provisions. North Carolina's blue-pencil rule does not allow courts to add or change language from a provision so as to make it reasonable; it only allows courts to delete language that makes the provision unenforceable.<sup>15</sup> If

<sup>11</sup> *Copypro, Inc. v. Musgrove*, 754 S.E.2d 188, 199 (N.C. Ct. App. 2014).

<sup>12</sup> *See Laboratory Corp. of Am. Hold. v. Kearns*, 84 F. Supp. 3d 447, 459 (M.D.N.C. 2015) (applying North Carolina law).

<sup>13</sup> *See Med. Staffing Network, Inc. v. Ridgway*, 670 S.E.2d 321, 327–28 (N.C. Ct. App. 2009) (holding non-compete that forbid the solicitation of "an unrestricted and undefined set" of potential clients unenforceable).

<sup>14</sup> *See Laboratory Corp. of Am. Hold. v. Kearns*, 84 F. Supp. 3d 447, 459 (M.D.N.C. 2015) (applying North Carolina law).

<sup>15</sup> *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 784 S.E.2d 457, 461 (N.C. 2016).

striking the unreasonable portions of a certain provision leaves no enforceable restriction, that provision will not be enforced at all.<sup>16</sup> The above provisions only can be made reasonable by adding language stipulating that the restriction shall only apply to customers with whom the employee had contact during her employment at PHC. Therefore, the North Carolina blue-pencil rule reaffirms the conclusion that those non-solicitation provisions are unenforceable due to overbreadth.

**b. Even If the Non-Compete Was Enforceable, Ms. Leggett Did Not Breach it.**

Breach-of-contract claims in the non-compete context are contingent on the validity of the unenforceable provisions of the non-compete.<sup>17</sup> Thus, to the extent that the non-compete would be enforceable under North Carolina law, Ms. Leggett did not breach the agreement.

**i. The Non-Compete Did Not Forbid Ms. Leggett from Working for a Competitor.**

PHC alleges that “Ms. Leggett has violated the terms and conditions of the Agreements by accepting employment with RX, a direct competitor.” However, the non-compete explicitly allowed Ms. Leggett to work for a competitor.<sup>18</sup> Moreover, in North Carolina, non-competes may not prohibit an employee from working for a competitor without regard to whether the employee’s new role actually competes with her former employer.<sup>19</sup> Therefore, Ms. Leggett did not breach the non-competition provisions by accepting a job at RX.

**ii. Targetall Is Not “Similar to” Aura.**

The non-compete prevented Ms. Leggett from marketing drugs at RX that are “similar to”

<sup>16</sup> *Id.* at 462.

<sup>17</sup> *Aesthetic Facial & Ocular Plastic Surgery Ctr. v. Zaldivar*, 826 S.E.2d 723, 733 (N.C. Ct. App. 2019).

<sup>18</sup> The Non-compete states: “This provision does not prevent Employee from seeking or obtaining employment or other forms of business relationships with a competitor . . . .”

<sup>19</sup> *Hartman v. W.H. Odell & Assoc.’s*, 450 S.E.2d 912, 919–20 (N.C. Ct. App. 1994).

the ones she marketed while at PHC.<sup>20</sup> However, there was no breach because Targetall is not “similar to” Aura. First, Aura and Targetall affect two different chemicals in the brain to treat two different conditions. Targetall is a psychostimulant which reduces inattentiveness and hyperactivity by increasing the concentration of noradrenaline in the brain. Aura, on the other hand, is an SSRI antidepressant which alleviates depression by increasing the concentration of serotonin in the brain. Second, whereas Targetall is FDA-approved to treat ADHD but is not FDA-approved to treat depression, Aura is not FDA-approved to treat ADHD but is FDA-approved to treat depression. Third, Targetall’s suggested off-label, antidepressant properties are only applicable to a small subset of all depression patients whereas Aura’s antidepressant properties are applicable to depression patients generally. According to the “investigational uses” of Targetall in its FDA indications, there has only been “some suggestion” that Targetall “might” be helpful for people that have both ADHD *and major depression*. Finally, whereas Targetall “is an efficacious weight loss medication,” patients taking antidepressants—not just Aura—tend to gain weight on average. Therefore, Ms. Leggett did not breach the non-competition provisions because Targetall is not “similar to” Aura.

## **II. PHC Has Not Demonstrated a Likelihood of Irreparable Harm If a Preliminary Injunction Is Not Granted.**

### **a. Any Alleged Harm to PHC Is Not “Actual and Imminent.”**

In order for an employer to show irreparable harm resulting from a former employee’s alleged breach of a non-compete, it must demonstrate that it faces an “actual and imminent” threat of a permanent loss of customers if a preliminary injunction is not granted.<sup>21</sup> A threat of permanent loss of customers without a preliminary injunction is “actual and imminent” where the employer

<sup>20</sup> See *id.* at 2.

<sup>21</sup> See, e.g., *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).



presents evidence that its former employee has diverted customers to a competitor and plans on continuing to do so.<sup>22</sup>

*Update, Inc. v. Samilow* is on-point here. In *Samilow*, shortly after defendant left his job at an eDiscovery and legal-staffing firm, he formed his own firm offering eDiscovery and legal-staffing services and thereafter began providing those same services to two of his former employer's clients.<sup>23</sup> In support of its motion for preliminary injunction, plaintiff offered evidence showing that defendant had diverted large eDiscovery and legal-staffing projects from plaintiff's clients and that he intended to participate in an event where he likely would present his competing services to prospective clients of plaintiff.<sup>24</sup> First, the court found that the threat of loss of customers was "actual" because plaintiff presented evidence that defendant had solicited and diverted business from plaintiff's clients that defendant serviced during his employment.<sup>25</sup> Second, the court found that the threat was "imminent" because the evidence indicated that defendant "appear[ed] intent" on continuing to divert business to his own firm.<sup>26</sup> The court granted the motion.<sup>27</sup>

First, the harm to PHC is not "actual." In *Samilow*, the employer was able to demonstrate with facts that some of its customers stopped using its services and instead began using the services of its former employee. Here, unlike in *Samilow*, in the nine months between Ms. Leggett's

<sup>22</sup> See *Update, Inc. v. Samilow*, 311 F. Supp. 3d 784, 796 (E.D. Va. 2018); *De Simone v. VSL Pharm. 's, Inc.*, 133 F. Supp. 3d 776, 799–800 (D. Md. 2015) (finding threat to be "actual and imminent" where former employee had plan to disrupt supply chain of former employer's product).

<sup>23</sup> *Samilow*, 311 F. Supp. 3d at 787. Defendant and plaintiff, employee and employer, had entered into a non-competition and non-solicitation agreement. *Id.* at 786.

<sup>24</sup> *Id.* & n.2. One of plaintiff's clients informed plaintiff that it planned on using another vendor for a project; plaintiff offered as evidence in support of its motion the inference that the other vendor was defendant. *Id.* at 787.

<sup>25</sup> *Id.* at 796.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 797.

beginning to work at RX and the filing of its complaint, PHC has not been able to allege that a single PHC customer has begun prescribing Targetall for their depression patients rather than Aura. Relatedly, whereas the parties' services in *Samilow* (eDiscovery and legal staffing) were identical, the only overlap between Targetall and Aura is the narrow set of patients who suffer from both ADHD and major depression. Second, the harm is not "imminent" either. In *Samilow*, the employer was able to identify, with evidence, its former employee's plan to solicit more of its customers. Here, PHC has not offered any evidence that creates the appearance that RX or Ms. Leggett has a plan to divert customers from PHC to RX. Therefore, PHC has not demonstrated irreparable harm.

**b. PHC Has Not Demonstrated that Irreparable Harm Is "Likely."**

Because of the "extraordinary" nature of injunctive relief, a preliminary injunction will not be granted "simply to prevent the possibility of some remote future injury."<sup>28</sup> The moving party must instead demonstrate the likelihood of irreparable harm if a preliminary injunction is not granted.<sup>29</sup> The moving party must also support its arguments with facts; conclusory statements are insufficient to show irreparable harm.<sup>30</sup>

In its complaint, PHC points to Ms. Leggett's social-media activity and her having received confidential information during her employment at PHC as proof that it has been irreparably harmed. However, PHC has not identified facts that show that it has lost or is going to lose customers<sup>31</sup> to RX as a result of Ms. Leggett. For instance, an electronic search of Ms. Leggett's

<sup>28</sup> *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g., MicroAire Surgical Instruments, LLC v. Arthrex, Inc.*, 726 F. Supp. 2d 604, 640 (W.D. Va. 2010) (finding irreparable harm not met where moving party's arguments were "based solely upon conclusory statements").

<sup>31</sup> *See Update, Inc. v. Samilow*, 311 F. Supp. 3d 784, 796 (E.D. Va. 2018) (requiring a showing at least of current harm to grant preliminary injunction).

email and laptop showed that she did not possess any confidential PHC information after her departure from PHC. But even if she did, unless PHC could show that Ms. Leggett used PHC's confidential information against it, her alleged possession of such materials at best only creates a potential for PHC to be harmed, not a likelihood. Therefore, PHC's conclusory statements only identify circumstances that suggest a mere *possibility* of harm absent a preliminary injunction rather than a *likelihood*, a standard that the United States Supreme Court has explicitly rejected for being "too lenient."<sup>32</sup>

**c. PHC Waited an Excessive Amount of Time Before Seeking a Preliminary Injunction.**

The contention that an employer has been irreparably harmed by a former employee's alleged breach of a non-compete is undermined by the employer's taking actions inconsistent with the necessity of its right to the relief contemplated in a non-compete that the employer drafted.<sup>33</sup> Specifically, where a non-compete gives the employer the right to seek a preliminary injunction and specifies that any breach will cause immediate and irreparable harm to the employer but the employer delays seeking a preliminary injunction, a court will not find irreparable harm.<sup>34</sup>

The non-compete in *Southtech Orthopedics, Inc. v. Dingus* specified that "any violation" would cause irreparable harm to the employer in the matter of "only a few days" and that the employer would be entitled to seek injunctive relief in the event of a breach.<sup>35</sup> However, the employer waited at least six weeks to file a motion requesting a preliminary injunction after it had learned of its former employee's breach.<sup>36</sup> The employer spent those six weeks negotiating with

<sup>32</sup> See *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) ("[The] 'possibility' standard is too lenient.").

<sup>33</sup> *Southtech Orthopedics, Inc. v. Dingus*, 428 F. Supp. 2d 410, 420 (E.D.N.C. 2006).

<sup>34</sup> *Id.* at 421.

<sup>35</sup> *Id.* at 420.

<sup>36</sup> *Id.*

its former employee.<sup>37</sup> The court was “reluctant to grant such an extraordinary remedy as a preliminary injunction” because the six-week delay undercut the employer’s contention that it would be irreparably harmed in a matter of days.<sup>38</sup> The court then held that the employer had failed to demonstrate a threat of irreparable harm.<sup>39</sup>

The non-compete between Ms. Leggett and PHC and the actions of the employers upon discovering the alleged breach are nearly identical to those in *Dingus*. First, both non-competes provided the employer the right to seek a preliminary injunction in the event of a breach. Second, just as the non-compete in *Dingus* asserted that “any violation” would result in irreparable harm in “only a few days,” the non-compete here asserted that “the violation of any covenant . . . will cause immediate and irreparable harm” to PHC.<sup>40</sup> Third, similar to *Dingus*, despite the non-compete’s assertion that irreparable harm would immediately follow a breach, approximately sixteen weeks lapsed between PHC’s learning of Ms. Leggett’s alleged breach and PHC’s requesting a preliminary injunction. If PHC itself drafted an agreement that said that any breach would result in *immediate* harm, it makes little sense for PHC to wait sixteen weeks before exercising its right to seek injunctive relief. Therefore, PHC’s multi-week delay demonstrates that it has not been irreparably harmed.

### CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiff’s request for preliminary injunction be denied.

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 420–21.

<sup>39</sup> *Id.* at 422.

<sup>40</sup> Courts have declined to find irreparable harm to be established by contract. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008) (emphasizing that movants seeking injunctive relief must demonstrate actual harm).

**Applicant Details**

First Name	<b>Rebecca</b>
Middle Initial	<b>S</b>
Last Name	<b>Van Voorhees</b>
Citizenship Status	<b>U. S. Citizen</b>
Email Address	<a href="mailto:rsv15@georgetown.edu">rsv15@georgetown.edu</a>
Address	<div> <b>Address</b>  <b>Street</b>  <b>1125 12th Street Northwest, APT 63</b>  <b>City</b>  <b>Washington</b>  <b>State/Territory</b>  <b>District of Columbia</b>  <b>Zip</b>  <b>20005</b>  <b>Country</b>  <b>United States</b> </div>
Contact Phone Number	<b>9738852309</b>

**Applicant Education**

BA/BS From	<b>Johns Hopkins University</b>
Date of BA/BS	<b>December 2016</b>
JD/LLB From	<b>Georgetown University Law Center</b> <a href="https://www.nalplawschools.org/employer_profile?FormID=961">https://www.nalplawschools.org/employer_profile?FormID=961</a>
Date of JD/LLB	<b>May 1, 2022</b>
Class Rank	<b>School does not rank</b>
Law Review/Journal	<b>Yes</b>
Journal(s)	<b>Georgetown Journal of Law &amp; Modern Critical Race Perspectives</b>
Moot Court Experience	<b>No</b>

**Bar Admission**

### **Prior Judicial Experience**

Judicial Internships/  
Externships      **No**  
Post-graduate Judicial  
Law Clerk      **Yes**

### **Specialized Work Experience**

### **Recommenders**

Rostain, Tanina  
tr238@law.georgetown.edu  
Wolfman, Brian  
wolfmanb@law.georgetown.edu  
202-661-6582  
Cedrone, Michael  
mjc27@law.georgetown.edu  
(202) 662-9568

### **References**

Professor Michael J. Cedrone (Georgetown University Law Center)  
781-413-1718; mjc27@georgetown.edu

Professor Tanina Rostain (Georgetown University Law Center)  
203-494-8645; tr238@georgetown.edu

Professor Brian Wolfman (Georgetown University Law Center)  
301-814-2138; wolfmanb@georgetown.edu

**This applicant has certified that all data entered in this profile and  
any application documents are true and correct.**

**REBECCA VAN VOORHEES**

12 Harvey Drive, Short Hills, N.J. 07078 • (973) 885-2309 • [rebecca.vanvoorhees@gmail.com](mailto:rebecca.vanvoorhees@gmail.com)

January 13, 2022

The Honorable Judith C. McCarthy  
United States District Court for the Southern District of New York  
The Hon. Charles L. Brieant Jr. Federal Building and United States Courthouse  
300 Quarropas Street, Courtroom 421  
White Plains, NY 10601-4150

Re: Judicial Clerkship for the 2023–2024 Term

Dear Judge McCarthy:

I am a third-year law student at Georgetown University Law Center, and I write to express my strong interest in clerking in your chambers beginning in 2023. I believe that my meticulous research, writing, and editing skills; strong academic record; and experience in writing-intensive and deadline-driven work environments would enable me to excel as a law clerk in your chambers.

I am drawn to novel and complex legal questions, and I can write about them clearly and concisely. As a student attorney in the Georgetown Law Appellate Courts Immersion Clinic, I co-wrote, with a fellow student attorney, an appellate brief in the Ninth Circuit in a prisoners' rights case and an amicus brief in support of certiorari in a special education case, while also working collaboratively with other students on their cases. As both a Law Fellow and editor in charge of above-the-line editing of the *Georgetown Journal of Law & Modern Critical Race Perspectives*, I have learned to provide constructive feedback and strengthen the legal writing of others while always maintaining their voice. And in my professional experiences, I have developed a keen attention to detail and thorough research skills, synthesizing large volumes of information and producing detailed work product on tight deadlines.

Enclosed please find my resume, law school transcript, undergraduate transcript, writing sample, list of references, and recommendation letters from Professor Michael Cedrone, Professor Tanina Rostain, and Professor Brian Wolfman. I would be delighted to have the opportunity to work with, and learn from, you. Thank you for your time and consideration.

Respectfully,

Rebecca Van Voorhees

## REBECCA VAN VOORHEES

12 Harvey Drive, Short Hills, N.J. 07078 • (973) 885-2309 • rebecca.vanvoorhees@gmail.com

### EDUCATION

#### GEORGETOWN UNIVERSITY LAW CENTER

*Juris Doctor*

GPA: 3.75/4.00

Honors: CALI Award for Writing, Appellate Courts Immersion Clinic; Top 10% Spring 2021; Dean's List 2019-2020

Journal: Articles Editor, *Georgetown Journal of Law & Modern Critical Race Perspectives*

Activities: Law Fellow (Legal Writing Teaching Fellow); Public Interest Fellow, ACS 1L Representative.

Washington, DC

Expected May 2022

#### JOHNS HOPKINS UNIVERSITY

Bachelor of Arts, Political Science Major, Minors in Social Policy, Theater Arts & Studies

GPA: 3.75 (Deans List Every Semester)

Leadership: Barnstormers Theater (Business Manager); Witness Theater (Finance Director).

Baltimore, MD

December 2016

### EXPERIENCE

#### JUDGE JACK SABATINO, NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

*Incoming Law Clerk*

Trenton, NJ

Aug. 2022 – Aug. 2023

#### GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC

*Student Attorney*

Washington, DC

Aug. 2021 – Dec. 2021

- Researched and co-wrote, under attorney supervision and with a student partner, an appellate brief filed in the 9th Circuit Court of Appeals in a prisoners' rights case and an amicus brief in support of certiorari in a special education case.

#### MACARTHUR JUSTICE CENTER, SUPREME COURT & APPELLATE PROGRAM

*Legal Intern*

Washington, DC

Jun. 2021 – Aug. 2021

- Researched and drafted portions of brief in opposition to a petition for a writ of certiorari in a police use-of-force case.
- Conducted research and prepared legal memoranda on federal juvenile life without parole and qualified immunity.

#### PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

*Law Clerk, Trial Division*

Washington, DC

Jan. 2021 – May 2021

- Researched and drafted motions to suppress evidence on various Fourth Amendment issues.

#### U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION

*Legal Intern, Special Litigation Section*

Washington, DC

Sept. 2020 – Dec. 2020

- Researched and wrote memoranda on conditions of confinement in prisons and due process protections for juveniles.

#### CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH

*Legal Intern*

Washington, DC

May 2020 – Aug. 2020

- Researched and wrote legal memoranda on extreme sentences and parole eligibility for youth in priority states.

#### THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

*Executive and Research Assistant*

Washington, DC

Jan. 2018 – Jun. 2019

- Supported the President & CEO and the Executive Vice President & COO by preparing briefing materials, managing calendars, arranging travel, and coordinating speaking engagements.
- Recruited and managed undergraduate and legal interns; coordinated the hiring process of all full-time staff positions.

#### OFFICE OF SENATOR CORY BOOKER

*Staff Assistant*

Washington, DC

Dec. 2016 – Dec. 2017

- Interacted with constituents on the phone, through written correspondence, and in person.
- Supported legislative staff by drafting memos and preparing briefing materials.

#### NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE

*Research Intern*

Newark, NJ

May 2016 – Aug. 2016

- Composed memos and briefs on police reform, juvenile justice, and ban-the-box legislation.

#### SCOTTISH PARLIAMENT

*Legislative Researcher*

Edinburgh, UK

Sept. 2015 – Dec. 2015

- Wrote speeches, parliamentary motions, and policy briefs for Bruce Crawford, MSP.



This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rebecca S. Van Voorhees  
GUID: 809598985

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center  
Juris Doctor  
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	91	Civil Procedure	4.00	A-	14.68	
			Charles Abernathy				
LAWJ	004	13	Constitutional Law I: The Federal System	3.00	A-	11.01	
			Susan Bloch				
LAWJ	005	11	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Michael Cedrone				
LAWJ	008	91	Torts	4.00	B+	13.32	
			Girardeau Spann				
Dean's List Fall 2019							
			EHrs	QHrs	Qpts	GPA	
Current			11.00	11.00	39.01	3.55	
Cumulative			11.00	11.00	39.01	3.55	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	002	12	Contracts	4.00	P	0.00	
			Michael Diamond				
LAWJ	003	91	Criminal Justice	4.00	P	0.00	
			Paul Butler				
LAWJ	005	11	Legal Practice: Writing and Analysis	4.00	P	0.00	
			Michael Cedrone				
LAWJ	007	91	Property	4.00	P	0.00	
			Michael Gottesman				
LAWJ	1326	50	Legislation and Regulation	3.00	P	0.00	
			William Buzbee				
Mandatory P/F for Spring 2020 due to COVID19							
			EHrs	QHrs	Qpts	GPA	
Current			19.00	0.00	0.00	0.00	
Annual			28.00	11.00	39.01	3.55	
Cumulative			30.00	11.00	39.01	3.55	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1491	101	~Seminar	1.00	A-	3.67	
			Joanne Chan				
LAWJ	1491	103	~Fieldwork 3cr	3.00	P	0.00	
			Joanne Chan				
LAWJ	1491	14	Externship I Seminar (J.D. Externship Program)		NG		
			Joanne Chan				
LAWJ	165	09	Evidence	4.00	A-	14.68	
			Tanina Rostain				
LAWJ	1722	05	Lawyers as Leaders	1.00	P	0.00	
			William Treanor				
LAWJ	361	02	Professional Responsibility	2.00	A-	7.34	
			Peter Tague				
LAWJ	536	13	Legal Writing Seminar: Theory and Practice for Law Fellows	3.00	A	12.00	
			Michael Cedrone				

-----Continued on Next Column-----

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1389	05	Racialization and American Law Seminar	3.00	A	12.00	
			Sherally Munshi				
LAWJ	1492	17	Externship II Seminar (J.D. Externship Program)		NG		
			Joanne Chan				
LAWJ	1492	86	~Seminar	1.00	A-	3.67	
			Joanne Chan				
LAWJ	1492	88	~Fieldwork 3cr	3.00	P	0.00	
			Joanne Chan				
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	
			Robin Lenhardt				
LAWJ	511	05	Introduction to Scholarly Editing Seminar	1.00	A	4.00	
			Sharon Nokes				
LAWJ	536	13	Legal Writing Seminar: Theory and Practice for Law Fellows	2.00	A	8.00	
			Michael Cedrone				
Dean's List Spring 2021							
			EHrs	QHrs	Qpts	GPA	
Current			14.00	11.00	42.35	3.85	
Annual			28.00	21.00	80.04	3.81	
Cumulative			58.00	32.00	119.05	3.72	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
			Immersion Clinic				
LAWJ	504	05	Appellate Courts		NG		
			~Writing	4.00	A	16.00	
LAWJ	504	80	~Research and Analysis	4.00	A-	14.68	
LAWJ	504	81	~Advocacy and Client Relations	4.00	A-	14.68	
			EHrs	QHrs	Qpts	GPA	
Current			14.00	14.00	53.36	3.81	
Cumulative			72.00	46.00	172.41	3.75	
Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
In Progress:							
LAWJ	126	05	Criminal Law	3.00	In Progress		
LAWJ	1322	05	Civil Rights Statutes and the Supreme Court Seminar	2.00	In Progress		
LAWJ	1468	08	Business and Financial Basics for Lawyers	2.00	In Progress		
LAWJ	1728	05	Reading the Police Seminar	2.00	In Progress		
LAWJ	178	05	Federal Courts and the Federal System	3.00	In Progress		
LAWJ	351	05	Trial Practice	2.00	In Progress		


-----Continued on Next Page-----

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Record of: Rebecca S. Van Voorhees  
GUID: 809598985

----- Transcript Totals -----				
	EHrs	QHrs	QPts	GPA
Current				
Annual	14.00	14.00	53.36	3.81
Cumulative	72.00	46.00	172.41	3.75
----- End of Juris Doctor Record -----				

Unofficial


 <b>JOHNS HOPKINS</b> UNIVERSITY		<b>ZANVYL KRIEGER SCHOOL OF ARTS &amp; SCIENCES</b> Baltimore, MD 21218      www.jhu.edu/registrar		<b>UNDERGRADUATE</b> <b>TRANSCRIPT</b>	
Student Name Van Voorhees, Rebecca Susan		Identifier 8812F5	Date of Birth 01/17/xxxx	JHU Degree and Date Conferred Bachelor of Arts 12/30/2016	
Year of Study Senior	Major Political Science			Date Printed 5/19/2021	
Other Major(s) xxxxx			Minor(s) Theatre Arts & Studies; Social Policy		

DIV	DEPT	CRSE #	COURSE TITLE	GRADE	CREDITS
<b>Fall 2013</b>					
			<b>Advanced Placement Examination</b>		
			Spanish Lang AS.210.111		3.0
			Spanish Lang AS.210.112		3.0
					<b>TOTAL 6.0</b>
<b>Fall 2013</b>					
AS	EART	270.102	Conversations with the Earth	S	3.0
AS	IDEP	360.247	Introduction to Social Policy: Baltimore and Beyond	S	3.0
AS	PSYC	200.132	Intro Developmentl Psych	S	3.0
AS	THEA	225.301	Acting & Directing Workshop I	S	3.0
AS	WRIT	220.105	Fiction/Poetry Writing I	S	3.0
			TERM GPA 0.00		<b>TOTAL 15.0</b>
Dean's List					
<b>Interession 2014</b>					
AS	HUMC	300.201	Film and Philosophy	S	2.0
			TERM GPA 0.00		<b>TOTAL 2.0</b>
<b>Spring 2014</b>					
AS	GRLL	211.174	Media of Propaganda	A	3.0
AS	POLI	190.102	Intro To Comp Politics	A-	3.0
AS	POLI	190.282	Authority and Liberty	B	3.0
AS	THEA	225.302	Acting & Directing Workshop II	A	3.0
AS	THEA	225.320	Performance	A	3.0
EN	CIVE	560.141	Perspectives Evolution Structures	B+	3.0
			TERM GPA 3.67		<b>TOTAL 18.0</b>
Dean's List					
<b>Fall 2014</b>					
AS	HART	010.201	Aggression in Painting, 1947-1977	A-	3.0
AS	PHYS	171.113	Subatomic World	A	3.0
AS	POLI	190.209	Contemp Int'l Politics	A	3.0
AS	POLI	190.226	Global Governance	A-	3.0
AS	THEA	225.345	History of Modern Theatre & Drama	A-	3.0
			TERM GPA 3.82		<b>TOTAL 15.0</b>
Dean's List					
<b>Interession 2015</b>					
AS	POLI	191.260	The Practice of Law	S	1.0
			TERM GPA 0.00		<b>TOTAL 1.0</b>
<b>Spring 2015</b>					
AS	COGS	050.107	Language and Advertising	A	3.0
AS	HIST	100.129	Intro Modern Jewish History	A-	3.0
AS	PSYC	200.325	Law Psych: Clinical Appl	B	3.0
AS	THEA	225.300	Contemporary Theatre & Film	B	3.0
AS	THEA	225.308	Shakespeare in Performance	A	3.0
			TERM GPA 3.54		<b>TOTAL 15.0</b>
Dean's List					
<b>Summer 2015</b>					
			<b>Rutgers University</b>		
			Basic Stat Methods EN.550.111		4.0
					<b>TOTAL 4.0</b>
<b>Fall 2015</b>					
			<b>Butler University</b>		
			Government & Politics in the UK TR.190.300		3.0

THIS INFORMATION HAS BEEN RELEASED IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND CANNOT BE FURTHER DISCLOSED TO ANY OTHER PARTY WITHOUT THE PRIOR WRITTEN CONSENT OF THE STUDENT.

The original transcript is in electronic PDF form. A printed copy of this transcript is not an original and is not considered to be an official transcript.

  
 Craig A. Smith, Deputy University Registrar

 <b>JOHNS HOPKINS</b> UNIVERSITY		<b>ZANVYL KRIEGER SCHOOL OF ARTS &amp; SCIENCES</b> Baltimore, MD 21218      www.jhu.edu/registrar		<b>UNDERGRADUATE TRANSCRIPT</b>	
Student Name Van Voorhees, Rebecca Susan		Identifier 8812F5	Date of Birth 01/17/xxxx	JHU Degree and Date Conferred Bachelor of Arts 12/30/2016	
Year of Study Senior	Major Political Science			Date Printed 5/19/2021	
Other Major(s) xxxxx			Minor(s) Theatre Arts & Studies; Social Policy		

DIV	DEPT	CRSE #	COURSE TITLE	GRADE	CREDITS
			Scottish Politics TR.190.300		3.0
			Research: Welfare Reform & Scotland Bill 2015		3.0
			TR.190.300		
			Scottish Society & Culture TR.230.300		3.0
			Internship Seminar TR.399.515		4.0
					TOTAL 16.0
			Study Abroad - University of Edinburgh Parliamentary Internship Program, Scotland.		
<b>Interession 2016</b>					
AS	HIST	100.290	Crime & Incarceration in US History	S	1.0
			TERM GPA 0.00		TOTAL 1.0
<b>Spring 2016</b>					
AS	IDEP	360.331	Methods for Policy Research	A-	3.0
AS	IDEP	360.366	Public Policy Writing Workshop	A	3.0
AS	POLI	190.380	The American Welfare State	A-	3.0
AS	SOCI	230.357	Baltimore as an Urban Laboratory	A	3.0
AS	SOCI	230.374	Poverty and Public Policy	A	3.0
AS	THEA	225.321	The Lab - Actor/Director/Playwright	A	3.0
			TERM GPA 3.90		TOTAL 18.0
			Dean's List		
<b>Fall 2016</b>					
AS	POLI	190.405	Food Politics	A-	3.0
AS	SOCI	230.400	Social Policy Seminar	A	3.0
AS	THEA	225.100	Introduction to Theatre	A-	3.0
AS	THEA	225.329	Acting & Directing Musical Theatre	A	3.0
			TERM GPA 3.85		TOTAL 12.0
			CUMULATIVE GPA 3.75	TOTAL	78.0
			CUMULATIVE CREDITS	TOTAL	123.0
			Graduated with General Honors		

\*\*\*\*\*End Of Transcript\*\*\*\*\*

THIS INFORMATION HAS BEEN RELEASED IN ACCORDANCE WITH THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND CANNOT BE FURTHER DISCLOSED TO ANY OTHER PARTY WITHOUT THE PRIOR WRITTEN CONSENT OF THE STUDENT.

The original transcript is in electronic PDF form. A printed copy of this transcript is not an original and is not considered to be an official transcript.

  
 Craig A. Smith, Deputy University Registrar

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

January 16, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I write to recommend Rebecca Van Voorhees strongly for a clerkship in your chambers. Rebecca's intelligence, work ethos, and energy will make her an excellent clerk, and her warmth and enthusiasm will contribute very positively to your chambers.

I had the great pleasure of having Rebecca in my Evidence class last fall. Between the Zoom teaching environment and a class enrollment of 126, it was a challenge for me to get to know all the students, but I got to know Rebecca well. She often participated in class and stayed afterwards to discuss evidentiary questions (and, as frequently, larger social and political issues.). Whether about the Rules of Evidence or the social and political questions of our time, our conversations were always engaging. Over the course of a long, fatiguing semester of remote learning, Rebecca continued to be highly motivated and enthusiastic. Her efforts produced a very good exam. While not quite earning her an A – which I attribute to her being “off” the day she took it – her essays were lucid and well written. Other writings of hers that I've reviewed demonstrate strong legal analysis, organization, and great clarity. She is, in short, a very good writer.

Rebecca's legal skills are first-rate. Her emotional intelligence and social skills are as well. As Rebecca tells it, her experience working as a staff assistant for Senator Cory Booker before law school was formative in developing these abilities. In Senator Booker's chambers, Rebecca was tasked with answering phone calls from constituents – according to her estimate, tens of thousands of calls. Not surprisingly, the constituents who took the time to call Senator Booker's office were very impassioned: some deeply distressed that the Senator could not address their problems; others very angry at the Senator's positions. (The Senator's opposition to the Muslim ban was a particular flash point.) As Rebecca described her work to me, in handling these calls, she had to balance explaining and defending Senator Booker's positions while responding attentively and sympathetically to the concerns raised by callers. Based on our interactions, I don't doubt that Rebecca did her job very well.

Rebecca is driven by a passion for social justice, and her long-held aspiration is to be a civil rights lawyer. The seed of this commitment was sown back in high school, when she decided to forego a promising acting career. Rebecca had organized her life around acting, particularly musical theater, and planned to pursue it as a career. But after an early professional gig – a commercial – she decided that she needed to find a more meaningful and fulfilling career. Fast forward to a steady stream of public interest work in college and law school, in public service and then public interest law, including paid and unpaid work at the New Jersey Institute for Social Justice, the Office of Senator Corey Booker, the Leadership Conference on Civil and Human Rights, and the Campaign for Fair Sentencing of Youth. This coming summer she is interning at the MacArthur Center in its Supreme Court and Appellate Program. As these placements attest, Rebecca is well on her way to becoming an outstanding civil rights advocate.

I am confident that Rebecca will be a terrific clerk. She is very smart, outgoing, and insightful. She will be a real team player and produce terrific work. I urge you to hire her in your chambers.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Tanina Rostain  
Professor of Law

Tanina Rostain - [tr238@law.georgetown.edu](mailto:tr238@law.georgetown.edu)



## GEORGETOWN LAW

**Brian Wolfman**  
Professor from Practice  
Director, Appellate Courts Immersion Clinic

January 13, 2022

Re: Clerkship recommendation for **Rebecca Van Voorhees**

I enthusiastically recommend Rebecca Van Voorhees to serve as a law clerk in your chambers.

I got to know Rebecca in fall 2021 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the U.S. Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. I worked with Rebecca nearly daily for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe her associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive working relationship.

I'll begin with my bottom line: Rebecca would be an excellent and diligent law clerk. She is a strong writer, so much so that I gave Rebecca the "CALI award" for the writing component of the clinic, signifying that Rebecca was at the top among many other talented students. Her analytical skills are also very strong. Finally, she was diligent in her work—ensuring that everything got done on time and well—and dedicated to her clients.

Rebecca was assigned two difficult litigation projects: an opening court of appeals' brief in a constitutional challenge to a state's procedures for imposing solitary confinement and a certiorari-stage Supreme Court amicus brief in case under the federal special-education statute (the Individuals with Disabilities Education Act). In both cases, Rebecca's work was uniformly

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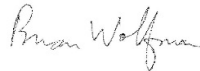
strong. Her work was done collaboratively with another student. On both cases, Rebecca became the de facto team leader, helping to ensure that she *and* her colleagues produced first-rate work on time.

Rebecca also excelled in the co-requisite seminar. The first two-thirds of the seminar is an intensive review of basic federal appellate courts doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, the students must master the difficult doctrinal material and apply it in a series of challenging writing assignments. We then take a short detour into Supreme Court practice and jurisdiction. Only capable students who are willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal clerkships. Rebecca did very well, receiving the second-highest grade in a class populated by high achievers.

\* \* \*

Beyond her legal ability, Rebecca is a fine person. She's honest and kind, and she has a terrific sense of humor. For these reasons, she would be an excellent colleague in chambers. So, I end where I began: I enthusiastically recommend Rebecca Van Voorhees for a clerkship. If you would like further information, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

January 19, 2022

The Honorable Judith McCarthy  
Charles L. Brieant, Jr. United States Courthouse  
300 Quarropas Street, Room 434  
White Plains, NY 10601-4150

Dear Judge McCarthy:

I am writing to strongly recommend Ms. Rebecca Van Voorhees for a clerkship in your chambers. Ms. Van Voorhees is an exceptionally bright, focused, and dedicated person who has applied herself wholeheartedly in my courses and at Georgetown generally. She is near the top of her Georgetown class, with a 3.6 GPA, and will make an outstanding law clerk and lawyer.

During the eventful 2019-20 academic year, Ms. Van Voorhees was a student in my first-year legal research and writing course. Her academic work during the fall semester merited a grade of "A." However, in the spring semester, the school elected to assign grades on a pass/fail basis to ameliorate inequities caused by the COVID-19 pandemic. Consequently, Ms. Van Voorhees ended up with a grade of "pass" for my year-long course. I am disappointed that this grade does not reflect the quality of Ms. Van Voorhees's work for me.

Ms. Van Voorhees's research and writing skills are superb. Her final writing project for my class was a brief arguing that a warrantless drone search of a fifth-floor condominium violated the Fourth Amendment. Ms. Van Voorhees's brief is well-researched and well-reasoned. The brief is quite an accomplishment, and it is work product that a legal supervisor would be pleased to receive from a young lawyer. Ms. Van Voorhees created arguments that were well-written and convincing. She argued for application of existing case law, and, where appropriate, for reasonable extensions of existing case law to cover new technologies and circumstances.

I was so impressed with Ms. Van Voorhees's abilities that I hired her to serve as one of six Law Fellows who assisted me in teaching the course for the 2020-2021 academic year. Law Fellows for the legal writing program at Georgetown are selected through a highly competitive process that includes personal interviews and submission of a writing sample, personal statement, recommendations, and transcript. I can assure you that Ms. Van Voorhees was one of the top candidates in a quite strong pool of some 180 applicants.

As a Law Fellow, Ms. Van Voorhees participated with her colleagues in a weekly, two-hour seminar course with me during which we analyzed legal issues relating to the first-year students' assignments and discussed commenting and conferencing techniques. Ms. Van Voorhees's contributions to this seminar class were most valuable. She easily masters large bodies of case law, and her colleagues and students benefited tremendously from her command of the law. Further, without prodding, she offered insights into her students' learning that aided me in calibrating the focus of my classroom teaching.

As a further part of her Law Fellow duties, Ms. Van Voorhees provided detailed comments to eight of my first year students on each of their written assignments and held individual conferences with those students three times in the course of the academic year. For many of the assignments, two drafts were required of the students, each of which received extensive comments from the Law Fellows. I closely supervise comments, reading the first year student's work and revising the Law Fellow comments on it. Ms. Van Voorhees's well-written and highly detailed comments explained her students' analytical weaknesses, logical leaps, and research gaps in clear yet supportive language. Ms. Van Voorhees routinely identified several possible solutions for shortcomings, enabling the student writers to become independent decision-makers.

Ms. Van Voorhees's many responsibilities as a Law Fellow required a strong work ethic. Commenting on first year students' memos and briefs is a labor-intensive task. I relied upon Ms. Van Voorhees to send comments to me early in the process and to work steadily until she finished—often ahead of my deadlines. Given the many other commitments she balanced as a second-year law student, this accomplishment alone was particularly impressive. More impressive yet is the fact that she communicated with me in a timely, professional, and courteous manner about how she planned to complete her work. I expect that Law Fellows will balance multiple demands. Ms. Van Voorhees's strong communication skills and her professionalism set her apart even in this highly successful group.

As a Professor, I enjoyed full confidence in Ms. Van Voorhees's abilities all year and relied on her exceptional judgment. Her advice to our students was always on-target. On those few occasions when she was unsure how to respond, she wisely chose to consult me first. Ms. Van Voorhees understood well the position of a Law Fellow: she respected my role as Professor and yet demonstrated appropriate independence and initiative in her role.

As you might surmise, Ms. Van Voorhees is a student whose personal habits bear the hallmarks of a professional. Not only is she diligent in completing assigned tasks, she is also willing to help out on issues that are not strictly her responsibility when

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there is need or when she has expertise that is particularly valuable.

Ms. Van Voorhees makes effective decisions under pressure, reconciles differences of viewpoint, and appreciates cultural differences. She is not at all rigid or unduly serious. She is a genial colleague who easily collaborates with others and is open to mentoring and supervision. I believe that she will be an asset to the legal profession.

Sincerely,  
/s/ Michael J. Cedrone

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**REBECCA VAN VOORHEES**

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**WRITING SAMPLE**

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The attached writing sample is a 15-page excerpt of a memorandum I drafted in Fall 2020 during an externship with the Department of Justice, Civil Rights Division, Special Litigation Section, shared with permission from the assigning attorneys. The memorandum summarizes available Supreme Court and Fifth Circuit case law relevant to mental health care for prisoners. Specifically, it addresses what is required to establish constitutionally inadequate (A) screening and identification of prisoners with mental illness; (B) treatment planning; (C) administration of medication and psychotherapy; and (D) staffing and facility design.

The Eighth Amendment’s protection from cruel and unusual punishment requires the government to provide adequate care to meet prisoners’ serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103–05 (1976). Interpretations of the Eighth Amendment “must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society.” *Ruiz v. Estelle*, 679 F.2d 1115, 1138 (5th Cir. 1982), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). The Fifth Circuit has long recognized that mental health needs are no less serious than other health needs. *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Arenas v. Calhoun*, 922 F.3d 616, 621 (5th Cir. 2019).

To prove that a prison’s mental health care is constitutionally inadequate, a two-part test must be satisfied: first, an inmate “must demonstrate that the alleged deprivation was objectively serious, exposing him to a substantial risk of serious harm,” and “[s]econd, an inmate must prove that the official possessed a subjectively culpable state of mind in that he exhibited deliberate indifference to serious medical needs.” *Arenas*, 922 F.3d at 620 (internal quotation marks omitted). To satisfy the first part, an inmate does not need to show that death or serious illness has already occurred. *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”). The Fifth Circuit defines a “serious medical need” as “one for which treatment has been recommended or for which the need is so apparent that even a layman would recognize that care is required.” *Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006). To satisfy the second part, the plaintiff must establish that the prison official acted with “subjective recklessness,” where “the official knows of and disregards an excessive risk to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The subjective recklessness standard is

satisfied if an official “acted or failed to act despite his knowledge of a substantial risk of serious harm.” *Estate of Cheney ex rel. Cheney v. Collier*, 560 F. App’x 271, 273–74 (5th Cir. 2014) (quoting *Farmer*, 511 U.S. at 842).

Deliberate indifference “is an extremely high standard to meet.” *Gobert*, 463 F.3d at 345–46. It requires “more than mere negligence, unreasonable response, or medical malpractice.” *Cheney*, 560 F. App’x at 273 (citing *Gobert*, 463 F.3d at 346). A plaintiff must prove that a prison official “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). If the risk of harm is “obvious,” circumstantial evidence can establish a subjectively reckless state of mind. *Farmer*, 511 U.S. at 842; see, e.g., *Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003) (finding deliberate indifference when an inmate was unconscious and vomiting for two hours before officials sought medical help).

Courts often examine factors “in combination” to evaluate the constitutional adequacy of a facility’s mental health program within the parameters of the two-part test. See *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) (citing *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). In the past, these factors have included: (A) a program for screening prisoners to identify those who require mental health treatment; (B) individualized treatment plans that go beyond placement in restrictive housing; (C) prescription and administration of medications and psychotherapy; and (D) adequate staffing and facilities. See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980) aff’d in part and rev’d in part on other grounds, 679 F.2d 1115 (5th Cir. 1982); *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995).

### A. Inadequate Screening and Identification of Prisoners with Mental Illness

To provide constitutionally adequate care, a prison must keep adequate medical records. *See, e.g., Newman v. State of Alabama*, 503 F.2d 1320, 1323–1323 n.4 (5th Cir. 1974) (affirming that medical care violated the Eighth Amendment in part due to “paltry records” that were “incomplete, inaccurate and not standardized”). This obligation includes intake and mental health screening. *See Thompson v. Ackal*, 15-cv-02288, 2016 WL 1394352, at \*8 (W.D. La. Mar. 9, 2016) (holding that inaccuracies in intake and mental health screening forms contributed to a constitutional violation); *Coleman*, 912 F. Supp. at 1305 (holding that the Eighth Amendment requires “a systematic program for screening and evaluating inmates to identify those in need of mental health care”). Screening must be done (or supervised) by staff with adequate training in mental health care, not just general medical training. *Braggs v. Dunn*, 257 F.Supp.3d 1171, 1201–02 (M.D. Ala. 2017) (finding 12-15 months of general medical training for nurses, with no supervision, to be constitutionally inadequate). When a prisoner is identified as at risk for mental illness, referrals must also be made to staff with adequate training in mental health care. *Thompson*, 2016 WL 1394352, at \*2 (finding that plaintiff survived motion to dismiss on deliberate indifference claim when plaintiff told nurse on two occasions that he wanted to kill himself, and both times the nurse referred him to “untrained Jail personnel” instead of medical staff).

The Supreme Court and the Fifth Circuit have rejected arguments that prisoners have an *absolute* right to psychological screenings. *See Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015); *Burns v. Galveston*, 905 F.2d 100, 104 (5th Cir. 1990). However, the Fifth Circuit has held that prisons must provide screening that can detect “obvious medical needs of detainees with known, demonstrable, and serious mental disorders.” *Evans v. City of Marlin*, 986 F.2d 104, 107 (5th Cir. 1993) (internal quotations omitted).

Courts look closely at the facts to provide flexibility in what they will accept as constitutionally adequate mental health screening and intake. In *Dockery v. Hall*, for instance, the court found no constitutional violation after an expert witness for the plaintiff testified that staff do not consistently review the entire medical record during intake, and that assessments contained erroneous information. 443 F.Supp.3d 726, 742–43 (S.D. Miss. 2019) (holding that plaintiff’s argument “that they should be screened differently” does not establish deliberate indifference). And in *Domino*, the court found that a five-minute mental health screening was not deliberately indifferent where a psychiatrist believed that the prisoner’s statements that he wanted to kill himself were not “genuine,” but the prisoner committed suicide less than three hours later. 239 F.3d at 753, 756.

In *Zavala v. City of Baton Rouge*, however, the court found that inadequate screening and identification of prisoners with mental illnesses, among other allegations, survived a motion to dismiss. No. CV 17-656-JWD-EWD, 2018 WL 4517461, at \*23 (M.D. La. Sept. 20, 2018). The plaintiff alleged that at a facility in Louisiana, (1) ten percent of newly admitted prisoners do not receive a “timely” intake screening, and some never receive one; (2) nurses performing screenings “vary in their adherence to screening policy and procedures”; and (3) chart reviews showed no evidence that health staff followed up when prisoners returned from the local hospital. *Id.* at \*3. The allegation that prison officials “failed to supervise their employees to properly screen prisoners with serious mental health conditions, provide access to appointments, [and] identify suicidal inmates” was sufficient to state a claim of deliberate indifference, and the alleged “policies and procedures [were] so deficient that the policies themselves are a repudiation of constitutional rights.” *Id.* at \*20.

## B. Inadequate Treatment Planning

In order to demonstrate deliberate indifference in treatment planning, a plaintiff must show that the defendant “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Johnson*, 759 F.2d at 1238. A prisoner’s disagreement with their diagnosis or dissatisfaction with treatment options are insufficient to establish deliberate indifference. *Grogan v. Kumar*, 873 F.3d 273, 279 (5th Cir. 2017). The vast majority of cases, summarized below, dismissed claims, granted summary judgment, or granted qualified immunity where plaintiffs alleged inadequate treatment planning, either finding that the defendants’ conduct amounted to (i) negligence or (ii) a matter of medical judgment and therefore failed to rise to the standard for deliberate indifference.

### (i) Negligence

Negligence in treatment planning, even gross negligence, is insufficient to establish deliberate indifference. *Thompson v. Upshur Cty*, 245 F.3d 447, 459 (5th Cir. 2001). In *Camese v. McVea*, the plaintiff alleged that a prison psychiatrist recommended he be transported to an outside facility for treatment but changed his recommendation after a conversation with the Deputy Warden. No. CIV.A. 14-202, 2015 WL 4937835, at \*1 (E.D. La. Aug. 17, 2015). The Plaintiff was kept in the prison infirmary on “extreme suicide watch” (placed in four-point restraints in an isolation cell) where he attempted suicide. *Id.* The plaintiff also alleged that the psychiatrist made him an appointment to meet with a mental health social worker, but the appointment never took place. *Id.* The district court held that “even if [the psychiatrist’s] recommendation regarding Plaintiff’s treatment was inadequate, deliberate indifference cannot be inferred merely from a negligent, or even a grossly negligent, response to a substantial risk of serious harm,” and that the

Plaintiff had failed to allege facts that would overcome a defense of qualified immunity. *Id.* at \*7–8.

(ii) Medical Judgment

When a treatment plan decision – including whether or not to treat – is made by a medical professional, courts generally defer to their judgment. *Gamble*, 429 U.S. at 107 (holding that whether “additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment”); *Tasby v. Cain*, No. CV 16-0277-JJB-EWD, 2017 WL 4295441, at \*9 (M.D. La. Sept. 12, 2017), report and recommendation adopted, No. CV 16-277-JJB-EWD, 2017 WL 4322413 (M.D. La. Sept. 28, 2017) (“[T]he classification of inmates is a matter left to the broad general discretion of prison officials”). In *Dockery*, for example, the plaintiffs alleged that treatment plans for mentally ill prisoners lack specificity, do not include behavior management plans, and provide “insufficient access to other structured mental health treatment programs such as group therapy and mental health activities.” 443 F. Supp. at 742 (S.D. Miss. 2019). The district court held that even if the plaintiff “would likely respond better if different treatment was provided,” that fact would be insufficient to prove deliberate indifference, because a failure to provide different types of mental health treatments does not establish a constitutional violation. *Id.* The court considered the fact that the defendants had (1) recently built a facility to house and monitor prisoners with mental illnesses and (2) contracted with a new company to provide mental health care in their determination that there was no deliberate indifference in the mental health care provided. *Id.*; cf. *Grogan*, 873 F.3d at 278–80 (holding that “good faith efforts” to treat the prisoner’s mental illness were sufficient to rebut a claim of deliberate indifference).



*Lewis v. Par. of Terrebonne* provides a useful—if rare—example of how treatment planning can constitute deliberate indifference. In *Lewis*, a detainee committed suicide in solitary confinement. 894 F.2d 142, 144 (5th Cir. 1990). Days before, the detainee had been sent to a medical center for swallowing a “large quantity of pills” and telling staff he wanted to die. *Id.* The detainee was sent back to the jail with a psychiatrist’s report in a sealed envelope concluding that he was suicidal and should be closely monitored. *Id.* The prison staff did not open the letter. *Id.* That next day, the detainee was put in solitary confinement after punching the deputy who had driven him to the hospital. *Id.* The Fifth Circuit upheld a jury verdict in favor of the plaintiff, concluding the evidence of the detainee being placed in solitary confinement without *any review* of his psychiatric evaluation could support a finding of deliberate indifference. *Id.* at 144–45.

### C. Inadequate Medication Administration and Psychotherapy

In order to demonstrate that a facility’s psychotherapy or medication administration amounts to deliberate indifference, a plaintiff must show that a prison official (a) had subjective knowledge of “a substantial risk of serious ... harm” and (b) that “he disregard[ed] that risk by failing to take reasonable measures to abate it.” *Gobert*, 463 F.3d at 346.

#### (a) Subjective Knowledge of Risk

Of these two elements, the first is easier to demonstrate. Subjective knowledge of risk “can be inferred merely from the obviousness of the risk.” *Hinojosa v. Livingston*, 807 F.3d 657, 667 (5th Cir. 2015) (finding ten heat-related deaths in the year before decedent’s heat-related death established knowledge of risk); see *Farmer*, 511 U.S. at 842 (“[I]f an Eighth Amendment plaintiff presents evidence showing that [the risk] was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk ... then such evidence

could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.”). However, if a professional had concluded that no risk existed, this will defeat a finding of subjective knowledge of risk. *See Domino*, 239 F.3d at 753, 756 (finding that neither the “brevity” of a psychiatrist’s evaluation, nor the prisoner’s stated intention to harm himself, were enough to find deliberate indifference because the psychiatrist believed that his threats were not “genuine”).

(b) Deliberate Indifference

Where a decision regarding medication or psychotherapy is made by a psychiatrist or medical professional, courts within the Fifth Circuit have been exceedingly deferential on the second element of deliberate indifference, holding that a medical professional’s failure to provide adequate care amounts to a mere “disagreement over medical treatment [and] cannot constitute deliberate indifference.” *See Gobert*, 463 F.3d at 346; *Welch v. Tex. Tech. Univ. Health Servs. Ctr.*, No. 2:09-CV-0291, 2012 WL 5986424, at \*7 (N.D. Tex. Nov. 7, 2012), report and recommendation adopted, No. 2:09-CV-0291, 2012 WL 5986445 (N.D. Tex. Nov. 29, 2012) (“As long as medical personnel exercise professional medical judgment, their behavior will not violate a prisoner’s constitutional rights.”). Prisoner allegations of deliberate indifference due to medical care (or lack of care) arise in one of three situations: (i) a denial of care; (ii) a delay in care; or (iii) care that is unsatisfactory.

(i) Denial of care:

An outright denial of necessary care fits neatly into the Fifth Circuit’s definition of deliberate indifference. *See Johnson*, 759 F.2d at 1238 (holding a plaintiff must prove a prison official “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious

medical needs”). So long as a plaintiff can prove that the defendant had actual or constructive knowledge of a need for care, plaintiffs usually survive motions for summary judgment and motions to dismiss; *See, e.g., Woodall v. Foti*, 648 F.2d 268, 270–71 (5th Cir. 1981) (finding that allegations of a prison psychiatrist advising a prisoner needed psychiatric treatment for pedophilia and suicidal tendencies which the prison was unable to provide, and the Sheriff refusing to provide that necessary treatment, were not frivolous); *McCorvey v. Styles*, 607 F. App’x 375, 376 (5th Cir. 2015) (denying defendant summary judgment where nurse outright refused to give prisoner an examination or mental health referral after being sexually assaulted, despite direct orders from the Office of Inspector General to do an oral swab and a rape kit).

(ii) Delay in Care:

A delay in providing care can “under certain circumstances evince a wanton disregard for a serious medical need.” *Delaughter v. Woodall*, 909 F.3d 130, 138 (5th Cir. 2018) (quoting *Johnson*, 759 F.2d at 1238); *see, e.g., Easter v. Powell*, 467 F.3d 459, 461–65 (5th Cir. 2006) (holding that a four-hour delay in providing treatment for chest pain to prisoner with a heart condition, which led to blood vessels bursting in his eye, was sufficient to overcome summary judgment). *But see, e.g., Arita v. Hooker*, No. CIV.A. 14-00116-BAJ, 2015 WL 520735, at \*1 (M.D. La. Feb. 9, 2015) (finding a two-week delay in mental health examination after use of force by prison staff did not amount to deliberate indifference, in part because the prisoner was immediately examined by medical personnel after the incident). When defendants can offer a reasonable purpose for the delay, courts are less willing to find that the plaintiff has stated a claim or survived summary judgment. Courts in the Fifth Circuit have allowed delays when: they are part of the prison’s “standard operating procedure,” *Arenas*, 922 F.3d at 619 (granting summary judgment to correctional officer who saw a prisoner with a noose around neck, but waited several

minutes before entering because prison policy mandated they call for backup before entering, and prisoner died during that time); they are due to “logistical problems in obtaining the medications,” *Armstrong v. Mid-Level Prac. John B. Connally Unit*, No. SA-18-CV-00677-XR, 2020 WL 230887, at \*6 (W.D. Tex. Jan. 15, 2020); or they are part of a “medical-judgment decision,” *Delaughter*, 909 F.3d at 138.

(iii) Unsatisfactory Care

Absent “exceptional circumstances,” “unsuccessful medical treatment, acts of negligence, or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment.” *Gobert*, 463 F.3d at 346. Even the decision whether or not to *provide* treatment “is a classic example of a matter for medical judgment.” *See Gamble*, 429 U.S. at 107. Because of this lenient standard, defendants who can demonstrate that *any* amount of care has been given to the plaintiff can usually succeed on a motion to dismiss or motion for summary judgment (as long as the care is sufficiently timely). *See, e.g., Sanders v. Martinez*, No. 1:08-CV-188-BI, 2009 WL 10702907, at \*6 (N.D. Tex. May 29, 2009); *Landry v. Tex. Dep't of Crim. Just.*, No. CV H-17-370, 2017 WL 6209607, at \*5 (S.D. Tex. Dec. 8, 2017); *Welch*, 2012 WL 5986424, at \*5-7.

In *Gray v. Brazoria Cty.*, the Southern District of Texas described the murky line between medical judgment and constitutionally inadequate treatment as thus:

[M]edical attention may be so deficient that it amounts to deliberate indifference. Although courts will not second-guess medical decisions, an official cannot immunize himself in every case by simply pointing out that a nurse or doctor reviewed a file or spent a few moments with a prisoner. At some point, the line between regrettable medical negligence and constitutionally inadequate medical care is crossed.

No. 3:16-CV-109, 2017 WL 713797, at \*5 (S.D. Tex. Feb. 23, 2017) (finding that “line” had not been crossed when detainee committed suicide in county jail after withdrawal from prescription medication taken from her after arrest; a jail nurse determined she was a suicide risk but then (1)

did not put her on suicide watch, (2) did not give her the medication as she requested, and (3) returned her to isolation).

The Fifth Circuit held that the conditions alleged in *Gates v. Cook* violated the Eighth Amendment due in part to inadequate mental health care. 376 F.3d at 335 (finding that death row inmates were offered “grossly inadequate” mental-health care that primarily consisted of mental health visits conducted in prisoner’s cells (within earshot of other prisoners), and psychotropic drugs administered “with only sporadic monitoring”). The Fifth Circuit upheld an injunction requiring that MDOC (1) “give each inmate private, comprehensive mental health examinations on a yearly basis,” (2) “monitor and asses” medication levels for prisoners receiving psychotropic medications, and (3) house prisoners “with psychosis and severe mental illnesses separately” from other prisoners. *Id.* at 342. In some extreme cases, courts in the Fifth Circuit have found deliberate indifference *despite* the adequate treatment the prisoner is receiving because of an outrageous action from a staff member. *See, e.g., Dennis v. Martin*, No. 2:15-CV-0330, 2018 WL 3598770, at \*6 (N.D. Tex. June 22, 2018), report and recommendation adopted, No. 2:15-CV-330-D, 2018 WL 3586239 (N.D. Tex. July 26, 2018). The Defendant in *Dennis* knew that an inmate was having a mental health crisis and threatening self-harm, did not notify mental health staff, and “called his bluff” by providing him with a razor, “daring [him] to injure himself to receive care.” *Id.* This was sufficient to successfully allege deliberate indifference, even though the prisoner had been receiving medical care and had been referred to crisis management earlier that day. *Id.*

#### **D. Inadequate Staffing and Poor Facility Design Contribute to Inadequate Mental Health Care**

To provide constitutionally adequate mental health care, a prison must maintain constitutionally adequate facilities and staffing levels. *Brown v. Plata*, 563 U.S. 493, 519, 521

(2011). However, and as described below, courts have left open the question of whether financial constraints are a viable defense against a claim of deliberate indifference. *Harris v. Angelina Cty.*, 31 F.3d 331, 335 (5th Cir. 1994) (citing *Seiter*, 501 U.S. at 301–02); see *Alberti v. Sheriff of Harris Cty.*, 937 F.2d 984, 999–1000 (5th Cir. 1991).

(i) Understaffing

Severe understaffing that makes supervision impracticable can support a finding of deliberate indifference. See *Brown*, 563 U.S. at 521 (holding that mental health treatment can be impeded by lack of adequate correctional staff, who are required to “escort prisoners to medical facilities or bring medical staff to the prisoners”). In *Brown*, mental health care was constitutionally inadequate in part because of vacancy rates for medical and mental health staff, which at that time included 39% for nurse practitioners and 54.1% for psychiatrists. *Id.* at 518. In *Harris*, a combination of understaffing and overcrowding “resulted in a denial of basic human needs of the jail population.” 31 F.3d at 335. The Fifth Circuit found that the plaintiff had established deliberate indifference based on evidence of the County’s “decision making authority” surrounding “staffing levels” and “deliberate decisions whether or not to pick up prisoners, to release them or to detain them.” *Id.* at 335–36. The Court found that this evidence was sufficient to overcome the Defendant’s argument that they did not meet the subjective element of deliberate indifference by doing “everything in their power ... to relieve overcrowding,” including building a new facility and transferring inmates. *Id.* at 336.

(ii) Poor Facility Design

“Defects in physical design” of a facility can also establish deliberate indifference. See *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986) (finding that defects including “poor sightlines, and an unreliable communication system,” resulted in “a continuous pattern of

deprivations which clearly reach constitutional dimensions”). In *Zavala v. City of Baton Rouge*, plaintiffs survived a motion to dismiss on their claim of deliberate indifference in part because of a city report that found that the Louisiana prison was “a dilapidated facility that is ill-equipped to hold [the] mentally ill who are booked.” 2018 WL 4517461, at \*4. According to the city report and the plaintiff’s allegations, the structural deficiencies included the following: (1) no mental health housing unit; (2) “woefully inadequate” suicide-watch cells that are “loud and without group rooms, a dayroom, or a private interview area”; (3) infirmary rooms that “are infirmaries in name only, as they are out of sight of [prison] personnel and without hospital beds”; (4) cell doors that do not shut due to rust; and (5) a layout that “makes it difficult to monitor prisoners.” *Id.* at \*3–4. However, the Fifth Circuit has found that reasonable precautions taken by a defendant can be sufficient to overcome a deliberate indifference claim based on structural deficiencies. *See, e.g., Hyatt v. Thomas*, 843 F.3d 172, 176–179 (5th Cir. 2016). A suicidal inmate in *Hyatt* was placed in a cell with a camera that had a blind spot, and after two shift changes, no personnel were aware that he was a suicide risk. *Id.* at 176. The inmate hung himself in a blind spot of the cell. *Id.* The Fifth Circuit affirmed summary judgement for the prison because staff had “responded reasonably” to the suicide risk by placing the inmate “under continuous, if ultimately imperfect, video surveillance.” *Id.* at 179.

(iii) Financial Constraints

The Supreme Court “has left open the question of whether a cost defense is available under Eighth Amendment analysis.” *Harris*, 31 F.3d at 336 (citing *Seiter*, 501 U.S. at 301–02); *see Alberti*, 937 F.2d at 999–1000. Although the Fifth Circuit has considered the issue, it has not come to a clear conclusion on what financial burdens would be unacceptable to place on a jurisdiction. *See Gates v. Collier*, 501 F. 2d. 1291, 1322 (5th Cir. 1974) (“That it may be inconvenient or more

expensive for the State of Mississippi to run its prison in a constitutional fashion is neither a defense to this action or a ground for modification of the judgment rendered in this case.”); *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980) (“[I]nadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement”). *But see Woodall*, 648 F.2d at 272 (“In assessing ... a prisoner's claim for unconstitutional denial of psychiatric care, ... [courts] should consider the availability and expense of providing psychiatric treatment and the effect of such unusual care on ordinary jail administration. In balancing the needs of the prisoner against the burden on the penal system, the district court should be mindful that the essential test is one of medical necessity and not one simply of desirability.”). This cost defense, if accepted, would require a municipal defendant to “establish that additional funding was unavailable from the taxpayers to address the [problem].” *Harris*, 31 F.3d at 336; *see Seiter*, 501 U.S. at 303 ([W]hether [conduct] can be characterized as ‘wanton’ depends upon the constraints facing the official.”).

### Conclusion

The two-prong deliberate indifference test “is an extremely high standard to meet.” *Gobert*, 463 F.3d at 345–46. It requires “more than mere negligence, unreasonable response, or medical malpractice.” *Cheney*, 560 F. App’x at 273 (citing *Gobert*, 463 F.3d at 346). Where a medical professional decides to provide care that proves to be insufficient, or decides that *no* care is warranted, the Fifth Circuit is extremely deferential, holding that these medical judgments “cannot constitute deliberate indifference.” *See Gobert*, 463 F.3d at 346; *Welch*, 2012 WL 5986424, at \*7 (“As long as medical personnel exercise professional medical judgment, their behavior will not violate a prisoner's constitutional rights.”).

Courts in the Fifth Circuit have found that deliberate indifference can be established when a prison has provided inadequate screening, treatment plans, administration of psychotherapy and



medication, supervision of suicidal prisoners, staffing, facilities, or a combination of these factors. *See, e.g., Estelle*, 503 F. Supp. at 1339; *Coleman*, 912 F. Supp. at 1298. However, to succeed on a claim of deliberate indifference to mental health care needs, a plaintiff must prove that a prison official (i) knew and understood a prisoner needed some form of care, but (ii) “refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.” *Johnson*, 759 F.2d at 1238.